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Supreme Court of the United States

OCTOBER TERM, 1950

No. 258

DEAN MILK COMPANY, APPELLANT,

vs.

CITY OF MADISON, WISCONSIN, A MUNICIPAL CORPORATION, DR. C. K. KINCAID, AS HEALTH COMMISSIONER FOR THE CITY OF MADISON, WISCONSIN, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

FILED AUGUST 22, 1950.

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INDEX

	Original	Print
Proceedings in Supreme Court of Wisconsin	1	1
Appellant's appendix on appeal from Circuit Court for for Dane County	1	i
Index to appendix and exhibits	275	275
Petition for appeal to Supreme Court of the United States	281	281
Assignments of error and prayer for reversal	287	284
Order allowing appeal	291	286
Bond on appeal (omitted in printing)	294	
Citation and service (omitted in printing)	297	
Stipulation as to record on appeal	300	287
Caption (omitted in printing)	302	
Notice of appeal to Supreme Court of Wisconsin	303	288
Bond on appeal (omitted in printing)	306	
Minute entry of argument and submission	308	289
Judgment	309	290
Opinion, Broadfoot, J.	311	290
Clerk's certificate (omitted in printing)	319	
Statement of points to be relied upon and designation of record	320	296
Order noting probable jurisdiction	323	298

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—866

STATE OF WISCONSIN

In Supreme Court

August Term, 1949. No. 216.

DEAN MILK COMPANY, a corporation,
Plaintiff-Appellant,

vs.

CITY OF MADISON, WISCONSIN, a Municipal Corporation, **DR. C. K. KINCAID**, as Health Commissioner for the City of Madison, Wisconsin, **LEONARD HOWELL**, as City Manager of the City of Madison, Wisconsin, and **THE COMMON COUNCIL OF THE CITY OF MADISON, WISCONSIN**,
Defendants-Respondents.

APPELLANT'S APPENDIX.

Rec. Page

89 Before Hon. Alvin C. Reis, Judge.

DECISION OF TRIAL COURT.

Plaintiff seeks a declaratory judgment as to the constitutionality of Madison's Milk ordinances which provide: (1) No milk shall be sold as pasteurized milk in the city of Madison unless it has been pasteur-

ized and bottled within a radius of five miles from the Capitol Square. (2) The Health Department shall not be "obligated" to inspect and issue permits to farms located more than twenty-five miles from the Capitol Square, as to raw milk to be delivered to pasteurization plants for sale in Madison.

The Madison Ordinance, as adopted August 27, 1949, contains the five mile and twenty-five mile provisions in sections 7.21 and 7.11, respectively, as follows:

"7.21. Pasteurization Plants to be Within Five Mile Radius. It shall be unlawful for any person, association or corporation to sell, offer for sale or have in his or its possession with intent to sell or deliver in the City of Madison, any milk, cream, or milk products as pasteurized unless the same shall have been pasteurized and bottled in the manner herein provided within a radius of five miles from the central portion of the City of Madison otherwise known as the Capital Square, at a plant housing the machinery, equipment and facilities, all of which shall have been approved by the Department of Public Health".

"7.11. Permits * * * On the filing of an application for a permit with the Health Commissioner he shall cause the source of supply named therein to be inspected and shall cause all other necessary inspections and investigations to be made. The Health Department shall not be obligated to inspect and issue permits to farms located beyond twenty-five (25) miles from the central portion of the City of Madison, otherwise known as the Capital Square."

The Madison milk situation is summarized in the City's brief (p. 3) as follows:

Rec.
Page

"Madison is the center of Dane County which produced in 1948 over 600,000,000 pounds of milk. This is more than ten times the milk used in the City. Large quantities of milk are shipped to the Chicago market and large quantities are made into cheese, butter, evaporated milk, etc. The area within a radius of 25 miles from the Capital Square in the City of Madison includes practically all of Dane County and portions of adjoining counties. At present Madison's pasteurized milk is furnished entirely from farms located within about 18 miles of the Capital Square.

"There are several distributors of milk in Madison, all of whose plants are located within 5 miles of the Capital Square: (1) The University of Wisconsin has its own plants for pasteurizing and supplying milk to University Halls and commons; (2) Rennebohm Farm supplies only the various Rennebohm Drug Stores and does not supply all of the stores' needs. There are three retail and wholesale dealers, the Borden Company, Bancroft Dairy and Bowman Farm Dairy supplying the city.

"Many of the producers are represented by a cooperative association which bargains for the producer with the dealers on the price of milk, checks weights and tests, inspects milk and assists in milk quality control. The cooperative also owns and operates a surplus plant through which it markets milk of Madison licensed producers which may from time to time be in excess of the milk required for consumption in Madison.

"All producers delivering on the Madison market are licensed by the City Health Department and are inspected by representatives of the Health Department as well as by representatives of the dealers and of the Cooperative Association."

Plaintiff is an Illinois corporation, with its principal place of business in Chicago. It has pasteurization plants at Chemung and Huntley, Illinois. Its milk is supplied by about 950 farms located chiefly in Illinois. These farms are licensed by the Chicago Board of Health and are inspected by that department. The plaintiff company also inspects the producers' farms and makes tests of milk purchased.

Plaintiff applied to the Madison Board of Health in March, 1948, for a license to sell milk in Madison. This was refused. On October 1, 1949, plaintiff applied to the Madison Board of Health for 950 farm permit application blanks. These were not furnished. Dr. Kincaid—the City Health Commissioner—explained that there was no point in having Dean's Illinois producers apply for permits until it was determined whether the five mile limit on pasteurization plants was legal—since admittedly Dean has no intention of pasteurizing within five miles of Madison but desires to sell milk in Madison which has been pasteurized in Illinois plants.

The above reflects with reasonable adequateness the background of the instant case.

We are constrained to remark that a record has been built up in the present lawsuit upon miscellaneous matters not decisive of the case, in our judgment, such as the relative merits of the United States Public Health Service "model" milk ordinance and the Chicago milk ordinance as compared with the Madison general milk requirements' ordinance; also the relative goodness and purity of plaintiff Dean's milk compared with Bowman's, Borden's and Ban-

Rec.
Page

croft's, *et al*, now consumed in Madison; further, the relative efficiency of inspection as between the Chicago Health Department and the Madison Health Department. Counsel even argue the issue whether
92 the "nethylene blue" or the "plate count" is the preferable test to determine if the number of bacteria in milk exceeds 200,000 per cubic centimeter!

We shall not exhaust brain tissue on such wanderings.

This Court's duty is to decide upon constitutionality, which decision, if it is good law, is good under the Federal Constitution anywhere in the United States and that decision cannot be swayed by a consideration of whether Madison's general milk requirements' ordinance is better or worse than some other ordinance in its provisions that water must be from state well-code wells, and milk must be cooled to 50°, while Chicago says 60°; and manure shall be pitched fifty feet from the barn door, whereas Chicago permits the pitch to be but thirty; the Madison ordinance requiring plant inspection every thirty days but Chicago, six months; and the provision as as "the trap in the drain from the milk house", the "breeze-way between the milk-house and the barn"; etc., etc.

How would the constitutional question in California be changed, even if Hollywood had a better or worse trap in the drain or breeze-way provision than Madison or Chicago? How would it be changed in New York is Schenectady called for 48° cooling or issues a mandate to scurry out the manure at least 70 feet?

The constitutional question still is: Can Madison or Chicago or Hollywood or Schenectady provide that

Rec.
Page

milk sold in its city must have been pasteurized within five miles of the center of the city and that farms more than twenty-five miles from the city need not be inspected (in effect, may not be eligible for a "permit" to sell raw milk to pasteurization plants serving the city)?

True it may be, as counsel for the City points out (brief, p. 17), that the *basic* local situation as to
93 whether a city has ten times as much milk produced in its immediate environs as it needs—which is Madison's situation—or whether it is compelled to "range far afield" for milk (*Ibid*)—which may be the fact in large metropolitan areas—this or some similar underlying and fundamental economic condition may effect the reasonableness, and hence the validity, of an ordinance.

But blue test or plate count—a pitch of fifty or thirty feet from the barn—50° or 60° cooling—and such minutiae *ad infinitum*—go only to the question of whatever Madison or Chicago has the better kind of milk regulations as to health and sanitary requirements. These details as to how to produce and care for milk do not hit the constitutional issue of the five mile limit at all, as we view it.

Is Madison's five mile pasteurization ordinance constitutional? It is.

Madison's five mile pasteurization ordinance is a valid regulation under the "police power" to protect the public health and welfare. It simplifies inspection of plants by requiring them to be near at hand, thus permitting more intense and constant inspecting than

Rec. Page

if such establishments were located anywhere in the United States.

A city like Madison, in the interests of public health, is entitled to set up its own system of milk inspection if it be a reasonable one. The City is not forced to rely upon inspection by some other governmental unit nor to submit to "reciprocal inspection" unless some higher authority properly decrees it.

One municipality does not have to sacrifice its standards to those of another community which may be lower nor is one governmental unit necessarily compelled to yield its independence to another, even though the latter's gauges of inspection purport to be equal or slightly higher.

94 The City of Madison—in the public concern over health—has an autonomy, a measure of local self-government, which, if exercised reasonably, need give way only to a constitutional enactment by the legislature of Wisconsin or the Congress of the United States, if such exists. None such does exist as yet.

Is this five mile limit valid? The all-sufficient answer is that our Supreme Court of Wisconsin has held it valid, i.e., has held that an ordinance imposing a *six* mile limit on pasteurization plants is valid; and probably no one would seek to split the hair on principle between five and six. The six mile ordinance was the Beloit enactment—which our Supreme Court upheld against all constitutional objection. — *Dyer* v. *City Council of Beloit*, 250 Wis. 613—*The High court's decision was on June* 10, 1947.

The Supreme Court of Wisconsin as a Court must overrule its decision of two years ago or else Madison's five mile pasteurization ordinance stands.

Petitioner in the *Beloit* case was one Dyer, a distributor for the same Dean Milk Company which is plaintiff in the case at bar. The City denied him a license to sell milk in Beloit because of its ordinance which provided (as quoted in the Supreme Court opinion, O. 615):

> "no pasteurized milk shall be sold in the city of Beloit which shall not have been pasteurized in approved plants within six miles from the intersection of State Street and East Grand avenue in the City of Beloit."

The Supreme Court in the *Beloit* case (p. 615) states Dyer's (Dean's) position which is exactly Dean's position today:

> "It is claimed this is a trade barrier, violates the right of contract guaranteed under the Fourteenth amendment of the constitution of the United States, and is in conflict with the interstate-commerce clause of the United States constitution, sec. 8, art. I."

The Supreme Court so thoroughly disposed of Dyer's (Dean's) contentions—which are the same contentions of Dean today—and that Court so precisely stated the factual picture at Beloit which is quite parallel with the one at Madison—that we quote at length from the Court's 1947 opinion (pp. 616-618):

> "That cities have a right to pass a milk ordinance for the welfare and health of their citizens is not disputed, and milk ordinances are general in the state of Wisconsin and elsewhere in the nation. Such an ordinance must be reasonable and not arbitrary, must not go beyond the reasonable demands of the occasion, and must tend to accomplish

Rec. Page

the purpose of its adoption. Courts will not interfere with the exercise of police power by a municipal corporation in the absence of a clear abuse of discretion and unless it is manifestly unreasonable and oppressive, for it is not within the province of the courts, except in clear cases, to interfere with the exercise of this power reposed by law in municipal corporations. 11 Am. Jur., Constitutional Law, p. 1092, sec. 307. Municipal corporations are *prima facie* the sole judges respecting the necessity and reasonableness of ordinances under their police power, and every intendment is to be made in favor of the lawfulness and reasonableness of such ordinance. The city is presumed to have full knowledge of local conditions, and its adoption of an ordinance in the light of this knowledge creates a *prima facie* presumption that it is reasonable. 3 McQuillin, Mun. Corp. (2d ed.) p. 110, sec. 951. The reasonableness of an ordinance depends upon the purpose sought to be accomplished and the effect upon all who must comply with it.

"The city of Beloit is in the center of an area producing great quantities of milk, containing a large number of pasteurization plants, condenseries, and creameries. The area described in the ordinance includes pasteurization plants both in Wisconsin and in Illinois. Over four hundred farms are included in the area and slightly over one hundred farms produce sufficient milk to supply the demand of the city of Beloit. Thus three fourths of the milk produced in the area is not required to supply the city of Beloit and is shipped elsewhere for such purposes as it may properly be used. The supply of milk in the area is ample for a large number of additional milk plants of any type that may desire to engage in the business. The ordinance clearly was not passed for the purpose of limiting the

Rec. Page

business to the plants then in operation. Milk is usually delivered to near-by plants as a matter of economy and convenience, which answers the contention that the location of the farms producing the milk is not limited by the ordinance but the location of the pasteurization plant is. The ordinance in question not only provides for the inspection of the pasteurization plants, but requires the inspection of the farms producing the milk.

96 "It is claimed by appellant, and admitted by the city sanitarian from a few examinations made by him, that the milk produced by the Dean Milk Company complied with the sediment tests, blue tests, other tests, and content requirements of the ordinance of the city of Beloit. This could well be true of milk purchased from a pasteurization plant a must greater distance from the city of Beloit. Convenience, efficiency, and cost of inspection enter into a determination of the question of the reasonableness of an ordinance. It is said in *State ex rel. Larson* v. *Minneapolis* (1933), 190 Minn. 138, 142, 251 N. W. 121, with reference to the constitutionality of a milk ordinance, quoting with approval from the trial court:

"'It is obvious that the adequate inspection is a reasonable precaution. It is obvious that consideration of convenience, efficiency and cost of inspection are proper to be taken into account in determining the question of reasonableness. It is also obvious that there is somewhere a limit of distance beyond which inspection by the city's agents would be too inconvenient, too costly, and too likely to be ineffective to be practicable. It seems to me there can be no doubt of the right of the city council to fix a reasonable limit beyond which it will not provide for inspection, and beyond which, for that reason, pasteurization plants will not be licensed.'

Rec. Page

"The city of Beloit has two employees in this department, the city sanitarian and an assistant, and proof was offered that to assume the inspection of the additional plant and farms it would require the employment of another employee at a cost of $2,400 per year, and if other likewise distant plants were included it would cost much more. Convenience and efficiency are self-evident.

"It cannot be said that the city, in adopting the section in dispute, arbitrarily acted on the question of convenience, efficiency, and cost of inspection, unless we adopt the rule in the case of *Meridian, Ltd.* v. *Sippy*, 54 Cal. App. (2d) 214, 128 Pac. (2d) 884, where the court said that milk production is a legitimate business and so long as persons engaged in the business put out a clean, pure and wholesome product it should be permitted to flow freely on the markets, unburdened by duplication of inspection and prohibitive trade barriers, *which rule we do not adopt.*" (Our italics)

It should be noted that the Supreme Court of Wisconsin, in the foregoing, *refuses* to adopt the rule laid down by the some court or courts, namely, that if the milk is "a clean, pure and wholesome product", therefore "it should be permitted to flow freely on the markets, unburdened by duplication of inspection and prohibitive trade barriers"—which is Dean's argument in almost its exact words, *infra*.

97 Our Court then continued and declared the law in a nutshell (pp. 618-619):

"Every ordinance must stand or fall upon its own merits. It is either reasonable or arbitrary in accordance with the facts and purposes it is intended to serve, if within the police powers of the municipality adopting it. The area necessary to be

Rec. Page

included in the ordinance could well depend upon the population to be served, the amount of milk produced, and the location of the pasteurization plants with reference to the population to be served. A reasonable exercise of police power is not a trade barrier, and contract rights guaranteed under the Fourteenth amendment of the federal constitution do not have a superior right to the right of a municipality to reasonably protect the health of its citizens."

Thus our Supreme Court dealt with Dean's argument that due process was denied it, under the Fourteenth Amendment of the Federal Constitution.

Dean in the case now before us, as well as in the *Beloit* case, advanced also the argument that the local ordinance interfered with interstate commerce and hence impinged upon the Federal Constitution.

Dean's position on interstate commerce is set forth concisely in its reply brief (p. 6) in the present case: "The test is, is the food or milk which the plaintiff proposes to sell a pure, wholesome product? If it is, it cannot be barred from interstate commerce."

But the Supreme Court did not agree with this argument in the *Beloit* case, for with equal conciseness the Court stated (p. 619):

"This ordinance does not violate the interstate-commerce clause of the United States constitution. Milk may be furnished from farms and pasteurization plants in the state of Illinois as well as in the state of Wisconsin, and in fact milk is so furnished. The production and delivery of milk are essentially local problems with which congress has not sought to deal, leaving the city of Beloit free to act in the exercise of its police powers."

Rec. Page

98 To be sure, the Court indicated that milk was being furnished to Beloit from both Illinois and Wisconsin; and it concluded that interstate commerce was not impaired. That consideration in the *Madison* case would go only to the twenty-five mile limit on inspection and permits to farms—the *second* ordinance herein attacked which we will discuss, *infra*.

There certainly can be no interference with interstate commerce by an ordinance reciting that milk must be *pasteurized* within five miles of Madison. That requirement seizes upon the product after it has come to rest in the state. That is not a prohibition of interstate commerce. It is a purely local regulation.

We unquestionably could render a declaratory judgment today upholding constitutionality of the five mile pasteurization ordinance in a one sentence opinion citing *Dyer* v. *Beloit* decided in 1947—except for the strange aftermath to the Supreme Court's opinion in that case.

After the Court's decision in their favor, the Beloit authorities changed their mind, amended their ordinance, and granted Dyer (Dean) a license. Dyer had, in the meantime, appealed from our Supreme Court's decision to the Supreme Court of the United States and there the Beloit authorities adopted the twist of moving to dismiss Dyer's appeal upon the ground that their change of heart by granting Dyer (Dean) a license had made the case moot. Thereupon, Dean objected to dismissing the appeal for the purported reason that this would leave the Wisconsin

Supreme Court's decision in effect, upholding the ordinance.

So, the Supreme Court of the United States *vacates* the Wisconsin Supreme Court's decision and remands the case to the Wisconsin high court "for such further proceedings as by that court may be deemed appropriate." Whereupon the Wisconsin Supreme Court *reverses* the Circuit Court for Rock County which originally it had affirmed in holding the ordinance valid!—*Dyer* v. *City Council of Beloit*, 252 Wis. 249 (March 29, 1948).

We quote in its entirety the text of the denominated reversal, all of which is printed in the type of a headnote (252 Wis. 249-250):

> "In this case, the court on June 10, 1947, affirmed a judgment of the Circuit Court dismissing the appellant's petition for a writ of *mandamus* to compel the city of Beloit to issue to the appellant a license as a milk distributor, and held a certain milk ordinance of the city constitutional. The case is originally reported in 250 Wis. 613, 27 N.W. (2d) 733. In proceedings on appeal to the United States supreme court, the respondents moved to dismiss the appeal on the ground that the case was moot, the respondents confessing error and setting forth that the city had amended the ordinance and issued a milk license to the appellant pursuant to the amended ordinance. The appellant opposed a dismissal of the appeal on the ground, among others, that a dismissal would result in permitting the judgment and decision of this court to stand as a valid judgment and decision holding the original ordinance constitutional and giving the city the right to re-enact the original ordinance. The United

Rec. Page

States Supreme Court on February 2, 1948, entered a mandate providing in part: 'On consideration of the motion of the appellees to dismiss, it appearing that the cause has become moot, the judgment of the supreme court of Wisconsin is vacated and the cause is remanded for such further proceedings as by that court may be deemed appropriate.' 333 U. S. 825, 68 Sup. Ct. 450, 92 L. Ed. 0000. (Reporter.)

"After the filing of the mandate of the United States Supreme Court in this court, the appellant on March 29, 1948, moved that the judgment of the circuit court be reversed and for other relief. After hearing counsel for the respondents as well as for the appellant, this court on March 29, 1948, entered the following mandate:

"*By the Court.*—'Judgment appealed from is reversed and cause remanded with directions to dismiss the complaint.'"

This *pro forma* action, the Supreme Court at Washington by vacating and the Wisconsin Supreme Court by so-called reversing, under the circumstances, surely has not erased and annihilated our Supreme Court's decision in the *Beloit* case *on the merits.*

100 Said the Supreme Court of the United States in *Berry* v. *Davis*, 242 U. S. 468, 470; 61 L. Ed. 441, 442:

"An appeal was taken to this court in 1914. In 1915 the Act of 1913 was repealed, and the substituted act does not apply to the plaintiff. • • • Therefore, upon the precedents we are not called upon to consider the propriety of the action of the district court, but the proper course is to reverse the decree and remand the cause, with directions that the bill be dismissed without costs to either party."

Plaintiff Dean cites us to a very late case—September 22, 1949—wherein the Supreme Court of Illinois decides in Dean's favor and holds invalid a Waukagan ordinance forbidding sale of milk in that city, unless the milk was produced and pasteurized in Lake County (wherein Waukegan is located).—*Dean Milk Co.* v. *City of Waukegan*, ... Ill. ...., 87 N.E. (2d) 751.

It is to be observed, of course, that the Waukegan ordinance demanded that *both* production and pasteurization of milk must be within Lake County, whereas Madison's five mile ordinance on Pasteurization—in and of itself—contains no mileage limit on production. The Wisconsin Supreme Court's decision in the *Beloit* case and the Illinois Supreme Court's decision in the *Waukegan* case, therefore, may be distinguishable.

Let us suppose, however, that the decisions of the highest courts of Illinois and Wisconsin are in conflict. What of it? We have never appreciated the idea of trying to reconcile the decisions of all courts everywhere, which apparently is the strain of most attorneys' briefs and of many judicial opinions.

Why compare incomparables? Men's minds and ideals and backgrounds differ, particularly in that shadowy domain of what is in the best interest of public health and the "general welfare".

Judges are lawyers. Lawyers differ in their opinions. Judges do not cease to be lawyers simply because they don black robes. Why should they not continue to have divergent opinions?——

Philosophizing aside—Illinois and Wisconsin high courts are opposed, we assume, on a certain issue

Rec. Page

of constitutional law. Shall we follow the Supreme Court of Illinois or the Supreme Court of Wisconsin? *Which do we have to follow?* Perforce it is the Wisconsin Supreme Court, even though we disagreed with it—*which we do NOT* in this case.

Accordingly, our conclusion is that the die has been cast—so far as Madison's five mile pasteurization ordinance is concerned—by the Supreme Court's sustaining of Beloit's six mile pasteurization ordinance, *supra*.

We come now to the 25 mile provision on inspection of milk farms and the consequence implicit in the ordinance, that is, that the Health Department need not inspect farms beyond 25 miles from Madison and hence these farmers—950 of them in Dean's territory in Illinois—may be ineligible for permits to produce milk for the Madison market.

We agree with the City Attorney (brief, pp. 2, 22) that the Court need not pass upon this 25 mile ordinance provision as to farmers, in the present litigation. Dean Milk Company is not a farmer—owns no farms. The 950 farmers are not parties in this action nor is a single Illinois farm such a party. The party plaintiff milk distributing corporation is not privileged to champion the rights of others and force an adjudication as to them.

Moreover, there is no "justiciable controversy"—to use an erudite term—between Dean and Madison as to the 25 mile limit—and justiciable controversy is of the essence in an application for a declaratory judgment.

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02 Dean Milk Company need not be concerned by where its farmer patrons live, so long as Dean is not pasteurizing, and has expressed no intent to pasteurize, within five miles of Madison. The question is completely academic and moot as to where Dean's milk comes from, if Dean is not going to sell in Madison—and Dean cannot sell in Madison without pasteurizing inside the five mile limit, if Madison's five mile pasteurization ordinance is valid—and we hereby hold it to be valid.

So our decision is confined to upholding the constitutionality of the five mile pasteurization ordinance and we do not penetrate the inquiry as to whether restricting milk production, in substance, to a 25 mile zone, is a violation of anyone's constitutional rights. We shall cross that bridge when we get on it in a proper case, if ever we do.

The City Attorney may prepare and submit to opposing counsel a declaratory judgment adjudging sec. 7.21 of the city ordinance of Madison to be valid in its enactment as follows:

"7.21. Pasteurization Plants to be Within Five Mile Radius. It shall be unlawful for any person, association or corporation to sell, offer for sale or have in his or its possession with intent to sell or deliver in the City of Madison, any milk, cream, or milk products as pasteurized unless the same shall have been pasteurized and bottled in the manner herein provided within a radius of five miles from the central portion of the City of Madison otherwise known as the Capital Square, at a plant housing the machinery, equipment and facilities, all of which shall have been approved by the Department of Public Health."

Rec.
Page

Dated, December 13, 1949.

• • • • •

PLAINTIFF'S SECOND AMENDED COMPLAINT.

56 Now Comes the plaintiff, by McGowan, Geffs, Geffs & Block, its attorneys, and for a cause of action against the defendants, complains and alleges as follows:

1. That the plaintiff is an Illinois corporation, having its main business offices in the City of Chicago, Cook County, Illinois, and that it operates a milk pasteurization plant in the City of Chemung, Illinois.

2. That the defendants above named are the executive, legislative and administrative officers of the City of Madison, Dane County, Wisconsin, and that the city of Madison, Wisconsin, is a municipal corporation.

3. That on the 14th day of February, 1930, the common council of the City of Madison, Wisconsin, adopted the following ordinance:

"Section 1. Section 43 of Subsection E of Ordinance Number 2183, entitled 'An Ordinance Amending the General Ordinances of the City of Madison relating to the License for Sale of Milk and Cream,' is hereby amended by inserting before the first sentence thereof the following: 'It shall be unlawful for any person, association, or corporation to sell, offer for sale or have in his or its possession with intent to sell or deliver in the City of Madison, any milk or milk products as pasteurized unless the same shall have been pasteurized and bottled in the same manner provided in this ordi-
57 nance within a radius of five miles from the central

Rec.
Page

portion of the City of Madison, otherwise known as the Capitol Square, at a plant the machinery, equipment and facilities of which shall have been approved by the Health Department'".

that at the time the controversy herein alleged and referred to rose, said ordinance as above quoted was in full force and effect.

4. That the plaintiff is engaged in the purchase of Grade A milk from farm producers and in the pasteurization thereof, and in the sale of said pasteurized milk to retail stores in cities and villages in the State of Illinois and Wisconsin; that on the 8th day of March, 1948, the plaintiff herein made application to the City of Madison for a license to distribute pasteurized Grade A milk. cream and milk products in the City of Madison. That on the 12th day of March, 1948, the plaintiff herein was notified by the Health Commissioner of the City of Madison that its request for a license was denied, and returned to the plaintiff herein the application fee deposited by the plaintiff at the time said application for license was filed; and stated in a letter that the plaintiff's request for a license must be denied. A copy of said letter is attached hereto, marked Exhibit A and made a part hereof.

5. That said application was denied at that time because plaintiff's pasteurization plant was located in Chemung, Illinois, more than five miles from the central portion of the City of Madison, otherwise known as the Capitol Square, and for no other reason, as plaintiff is informed and believes.

6. That the milk which the plaintiff intended to

Rec. Page

sell to the City of Madison, Wisconsin, if its application for license had been granted, complied with all requirements of the milk ordinance of the City of Madison as to place of production, pasteurization, and requirements as to quality and sanitary conditions, except that said milk was not pasteurized within the five mile zone designated in said ordinance.

58 7. Plaintiff further alleges that had said license been issued to plaintiff, it was its intention to obtain the milk which it intended to sell in the City of Madison from its pasteurization plant in the City of Chemung, Illinois, after the same had been bottled and placed in paper cartons, and then packed into a refrigerated truck and transported from said city of Chemung, Illinois, and sold to various retail grocers in the City of Madison, Dane County, Wisconsin. That said facts were made known to the above named defendants on many occasions, before filing said application for license, and at the time said application was filed.

8. That plaintiff on several occasions has requested the said defendants since the request to issue said license as aforesaid, and in open meeting has requested said City Council of Madison to amend said ordinance so that the plaintiff herein could have issued to it upon proper application a license to distribute milk in said City of Madison as aforesaid, submitting to said City Manager and said City Council that the ordinance for the sale of milk and cream in the City of Madison was unconstitutional for the reasons herein stated.

Rec. Page

9. That although the said section of the city ordinance of the City of Madison requiring that milk be pasteurized within the five mile zone was unconstitutional, the defendants did not grant the plaintiff a milk license as they should have done, but on August 27th, 1949, adopted a new milk ordinance, a copy of which is attached hereto, and made a part hereof, and marked "Exhibit B"; that said new ordinance re-enacted in Section 7.21 the provision of the prior ordinance that it was unlawful for milk to be sold in the City of Madison which had not been pasteurized within the five mile zone.

10. That the said provision in the milk ordinance of August 27th, 1949, prohibiting the sale of milk not pasteurized within the five mile zone is unconstitutional, in that it violates the provisions of the Four-
59 teenth Amendment to the Constitution of the United States, and deprive this plaintiff of the right to contract, and the right to do business, in violation of said amendment, and deprive the plaintiff of its property without due process of the law, and said provisions are in conflict with Section Eight, Article I of the United States Constitution, which provides that the Congress shall have power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes", and that said provisions are a violation of the constitution of the State of Wisconsin.

11. That although the plaintiff made application on March 8th, 1948, for a license to sell pasteurized Grade A milk and milk products in the City of Madison, Wisconsin, that said license was denied on March

Rec.
Page

12th, 1948, and that the defendants then took the position, and still take the position, that the plaintiff is not entitled to sell milk in the City of Madison because its pasteurization plant is not located within the five mile zone; that the plaintiff contends that the said provision is unconstitutional, and that there now exists a controversy between the plaintiff and defendants as to the legality of said provision.

12. That Section 7.20 of the ordinance of August 27th, 1949, provides it shall be unlawful to sell milk in the City of Madison from a plant which has not been licensed by the City of Madison, Wisconsin; said section also provides: that the owner of the plant shall make application setting forth (a) name, post office address and exact location of the dairy, (b) if the applicant does not keep cows, the source or sources from which he obtains milk or cream for sale or delivery, (c) said applicant shall present written consent granting the Health Commissioner free and open access to the dairy plant and its premises for the purpose of making such inspection as he may deem necessary, regardless of whether the dairy plant is in operation or not, (d) the application shall state whether Grade A pasteurized milk or milk products or certified pasteurized milk are to be sold, (e) such application shall state the average daily volume of milk processed and delivered and such other information as may be necessary to the Department of Public Health, and (f) a license fee of One Dollar ($1.00) shall acompany such application.

That although the plaintiff is able, ready and willing to make a new application and to pay the One

Dollar ($1.00) and to furnish all the information called for, that said application would be useless, because the defendants take the position that they are not obligated to inspect the plaintiff's plant and issue to it a license because said pasteurization plant is not located within the aforementioned five mile zone.

13. That the farms from which the plaintiff obtains milk and its pasteurization plant at Chemung, Illinois, and the vehicles in which said milk are delivered, are inspected weekly by inspectors hired by the plaintiff, and are inspected by the City of Chicago, Illinois, and that the city ordinance of Chicago, Illinois, contains provisions insuring the purity, quality and sanitation of the milk which are equivalent to that of the City of Madison, Wisconsin, under its present ordinance; that the plaintiff's milk is Grade A milk as provided in the United States Model Milk Ordinance promulgated by the United States Public Health Service, and that plaintiff's milk and milk products are produced, pasteurized, bottled, transported and inspected in compliance with the United States Model Milk Ordinance which is equivalent to the ordinance attached as Exhibit B as to purity and sanitation; that although the plaintiff made application on March 8th, 1948, for a license to sell milk in said city of Madison, the defendants have made no attempt to inspect the said farms from which the plaintiff obtains milk, or to inspect its plant or the vehicles in which said milk is transported, and have made no attempt to satisfy themselves that said milk was produced, pasteurized and transported pur-

Rec. Page

61 suant to inspections of the city ordinance of the City of Chicago, Illinois, which has provisions equivalent to that of the City of Madison, Wisconsin, as above alleged; that said inspectors of the City of Chicago are qualified to make inspections under and carry out the necessary provisions of said Chicago ordinance, and their inspections are accepted and approved by other cities and communities; that the defendants have taken no steps whatsoever to satisfy themselves as to the purity, quality and sanitation of the plaintiff's milk, and do not propose to do so, and claim that they have the right not to do so, and to bar the plaintiff from selling milk in the City of Madison, Wisconsin, because the plaintiff's milk is not pasteurized within the five mile zone.

14. That Section 7.25 of the ordinance adopted August 27th, 1949, by the defendant city, provides:

> "This ordinance shall be enforced by the Health Commissioner in accordance with the interpretation thereof contained in the current edition of the United States Public Health Service Milk Code, a certified copy of which shall be on file in the city clerk's office, provided that in case of upward revisions, the provisions shall be interpreted according to the provisions expressed in this ordinance."

That Section 11 of the United States Public Health Service Milk Code above referred to reads as follows:

> "Milk and milk products from points beyond the limits of routine inspection of the city of ..... may not be sold in the city of ....., or its police jurisdiction unless produced and/or pasteurized under provisions equivalent to the requirements of this ordinance;

Rec. Page

provided that the health officer shall satisfy himself that the health officer having jurisdiction over the production and processing is properly enforcing such provision."

That the following comment is made by the United States Public Health Service following the proposed section:

"It is suggested that the health officer approve milk or milk products from distant points without his inspection if they are produced and processed under regulations equivalent to those of this ordinance, and if the milk or milk products have been awarded by the State control agency a
62 rating of 90 percent or more on the basis of the Public Health Service rating method."

That plaintiff's milk and milk products have been awarded a rating of better than 90 percent by the State Control Agency.

15. That the milk and milk products that the plaintiff proposes to sell in the city of Madison, Wisconsin, meet all of the requirements of the city ordinance of the city of Madison, Wisconsin, including the requirements in respect to production, pasteurization, and distribution, except said milk is not pasteurized within the five mile zone; that the plaintiff sells milk in the City of Chicago and over two hundred other municipalities in the State of Illinois, and the State of Wisconsin, and that the health officers of the City of Chicago are enforcing the provisions of the city ordinance of the city of Chicago over the production and processing and distribution of said milk; that under the model milk code promul-

Rec. Page

gated and recommended by the United States Department of Health, the health officer of the city of Madison, Wisconsin, without undue expense or inconvenience could long before this time have satisfied himself that the said milk is being produced, pasteurized and distributed under standards equivalent to those prescribed by the present ordinance of the city of Madison, Wisconsin, and that said standards were being enforced by other municipalities and by the plaintiff maintaining inspectors over said farms, pasteurization plant and delivery vehicles; that the milk proposed to be sold by the plaintiff meets the requirements of the milk ordinance and code recommended by the United States Public Health Service.

16. Plaintiff further alleges that by reason of the above and foregoing, it is necessary for the rights of the plaintiff to secure a declaratory judgment under Sec. 269.56 of the Wisconsin Statutes.

Wherefore plaintiff asks that a declaratory judgment be entered herein as follows:

63 1. That the Court adjudge that the provisions of the present Madison milk ordinance providing that milk cannot be sold in the City of Madison unless pasteurized within the five mile zone be unconstitutional, null and void.

2. That the plaintiff be given a full and complete determination and declaratory judgment of its rights in accordance with the claims and demands of the plaintiff as set forth in this complaint.

3. For such other and further declaratory judgment, order or relief as may be just and proper.

Rec. Page

And for a further cause of action the plaintiff complains and alleges as follows:

1. The plaintiff adopts and makes a part of this count the following paragraphs of Count One to the same effect as if set out in full herein: one, two, four, six, seven, fourteen and fifteen.

2. That the plaintiff began the action set forth in Count One in October of 1948; that on December 18th, 1948, the defendants served an answer upon the plaintiff's attorneys, and in said answer in paragraphs 14, 15, 16, 17, and 18, set forth that milk was being supplied to the city of Madison from approximately four hundred farms located within a radius of twenty-five miles of Capitol Square of the City of Madison; that the defendants were informed and believe that the plaintiff obtained its milk from two-hundred or more farms located chiefly in the State of Illinois, many miles from Madison; that it was impractical for the plaintiff to segregate the milk which is processed at its Chemung, Illinois, plant that would be sold in Madison, Wisconsin; and that to grant the plaintiff a license would place an undue burden upon the city Health Department, and would require: "at least one additional full time qualified dairy sanitarian on the staff of the City Health Department, adequately to inspect the plaintiff's plant and the
64 farms delivering to it; thus unreasonably adding to the inconvenience and cost "of milk inspection"; that the plaintiff takes the position that the method set forth in the Model Milk Ordinance promulgated by the United States Public Health Service is an adequate method of insuring the purity and sanitation of

Rec.
Page

milk and milk products, and that if followed by the city health department of Madison, Wisconsin, would not place any undue burden upon the said city health department.

3. That pending this litigation, the City of Madison adopted the city ordinance attached hereto and marked "Exhibit B" and made a part hereof as fully as if set forth herein; that the said ordinance contains a provision in Sec. 7.11 that the farms where the milk is produced must obtain a permit from the city of Madison, Wisconsin, and provides:

> "The Health Department shall not be obligated to inspect and issue permits to farms located beyond twenty-five miles from the central portion of the Capitol of Madison, otherwise known as Capitol Square."

4. That said ordinance adopted August 27th, 1949, also provides in Sec. 7.20 (2) that the milk producer must make application:

(a) Giving name and address of the farm owner,

(b) Name and address of the tenant, if there is one,

(c) Legal description of the premises,

(d) The name of the dairy plant to whom the milk is to be sold, and

(e) A statement granting free access to the premises to the Health Commissioner at all times for such inspection as he may deem necessary.

5. That the plaintiff does not own the farms on which it obtains the milk which it pasteurizes at Chemung, Illinois, but obtains the milk from approximately nine hundred different farms located in Northern Illinois and Southern Wisconsin, at distances rang-

ing from forty to one hundred twenty-five miles from the city of Madison, Wisconsin; that the plaintiff does not obtain milk from any farms, and has no contract with any farmer to furnish it with milk, which is located within the twenty-five mile radius of the city of Madison, Wisconsin.

6. That the plaintiff's business is dependent upon obtaining milk from the said milk producers located in Northern Illinois and Southern Wisconsin; that the plaintiff is able, ready and willing to have each of said owners of said farms where it obtains said milk make application to the city health department of Madison, Wisconsin, but that upon information and belief, said application by said farm owners would be a useless gesture, and that the said city of Madison would deny the said farm owners the respective permits.

7. That the defendants take the position that the city health department of Madison has a discretion as to the inspection of said farms and the issuance of said permits, and that in the absence of a favorable decision by the said health department, have the right to deny the issuance of said permits to the said owners, and have the right to deny the plaintiff the right to sell its milk and milk products in the city of Madison, Wisconsin; that the plaintiff takes the position that the health department of Madison does not possess such rights, and that the said ordinance, in so far as it restricts, limits and prohibits the plaintiff from selling its milk and milk products in the city of Madison, Wisconsin, is unconstitutional, being in violation of the 14th Amendment of the

Rec. Page

United States Constitution in that it deprives the plaintiff of its right to contract, its right to property, denies to the plaintiff the equal protection of the law, denies to the plaintiff the right to transact a lawful business, and violates the Interstate Commerce Clause of the United States Constitution, and violates the Constitution of the State of Wisconsin.

66 8. Upon information and belief plaintiff alleges that the health department of the city of Madison would refuse upon application to inspect the said farms and to issue the permits, and that said action is arbitrary, discriminatory and unreasonable; that Sec. 7.25 of the said ordinance adopted August 27th, 1949, which provides that the Health Commissioner shall enforce this ordinance in accordance with the interpretation contained in the current edition of the United States Public Health Service Milk Code, provides the said Commissioner of Health with an adequate and reasonable means, with little expense, of satisfying himself that the farms from which the plaintiff obtains its milk are sanitary, and operated in accordance with the provisions of said ordinance of the city of Madison.

9. That there exists a controversy between the parties as to the said matters, and that it is necessary for the rights of the plaintiff to be declared under Sec. 269.56 of the Wisconsin Statutes.

Wherefore the plaintiff asks declaratory judgment be entered herein as follows:

1. That the Court adjudge that Sec. 7.11 of the ordinance of August 27th, 1949, be construed as not giving the Health Commissioner of the city of Madi-

Rec. Page

son, Wisconsin, the discretion not to inspect the farms from which the plaintiff obtains its milk, if said farm owners make proper application.

2. That if said section is not susceptible of said interpretation, that it be declared unconstitutional, null and void.

3. That this Court declare that the defendants have not the right to restrict, prohibit or prevent the plaintiff from selling its milk and milk products in the city of Madison, Wisconsin, by virtue of Sec. 7.11 of said ordinance.

67 10. That the plaintiff be given such further and other relief as shall be just and equitable.

McGowan, Geffs, Geffs & Block,
Attorneys for Plaintiff.

68 EXHIBIT "A".

City
of
Madison

Madison 3, Wisconsin
Board of Health
110 North Hamilton Street
March 12, 1948

Dean Milk Company
206 E. Front St.,
Harvard, Illinois.

Att: Mr. J. W. Mumford

Dear Sir:

Your application for a license to distribute pasteurized milk, cream, and milk products in the city of Madison has been received and considered.

Rec. Page

Our city ordinance sets up certain restrictions and requirements concerning dairy plants and farms producing milk for the city of Madison.

We are sorry to inform you that under this ordinance your request for a license must be denied. We are, therefore, returning your check of March 8th for one dollar.

Very truly yours,
Louis Fauerbach
Health Commissioner.

Exhibit B of the complaint being the Milk Ordinance of the City of Madison, adopted August 27, 1949 was introduced in evidence as Exhibit 45 and the material parts will be printed as that Exhibit.

72 ANSWER TO SECOND AMENDED COMPLAINT.

Now Come The Defendants herein, appearing by Harold E. Hanson, City Attorney for the City of Madison, Wisconsin, and as and for an answer to the first cause of action of the second amended complaint of the plaintiff herein, respectfully allege and show to the Court as follows:

1. Defendants admit upon information and belief that the plaintiff is an Illinois corporation having its main business offices in the City of Chicago, Cook County, Illinois, and that it operates a milk pasteurization plant in the City of Chemung, Illinois.

2. Defendants admit that they are the executive, legislative and some of the administrative officers of the City of Madison, Dane County, Wisconsin and that the said City of Madison is a municipal corporation.

Rec.
Page

3. Defendants admit that on or about the 14th day of February, 1930, the Common Council of the City of Madison, Wisconsin adopted an ordinance, a portion of which is set forth in paragraph 3 of the plaintiff's complaint and that at the time the controversy alleged in the complaint arose the said ordinance was in full force and effect and still is in full force and effect. The defendants, however, allege that the portion of the said ordinance so set forth in the plaintiff's complaint is a mere fragmentary portion of the then existing ordinances of the City of Madi-
73 son dealing with the entire subject of sale of milk and dairy products within the city and including standards for production, processing, manufacturing, transportation, handling, sale and delivery of such milk and dairy products and requiring regular inspection by the City Health Department of all dairy plants and all farms on which milk is produced for sale in the City of Madison. Attached to the answer to the original complaint as Exhibit 1 and incorporated herein as though fully set forth herein is a copy of the portions of the Madison City Ordinances as they existed in March, 1948 and until August, 1949 dealing with the said subjects of milk and dairy products, of which ordinances the section set forth in plaintiff's complaint is an integral part and which ordinances had been duly adopted prior to March, 1948 and were then in full force and effect.

4. Defendants admit that on or about the 8th day of March, 1948, the plaintiff herein made application to the City of Madison for a license to distribute pasteurized Grade A milk, cream and milk products

Rec. Page

in the City of Madison and that on or about the 12th day of March, 1948 the plaintiff was notified by the Health Commissioner of the said city that its request for a license was denied and there was returned the application fee of $1.00 deposited by the plaintiff at the time said application for license was filed; and further admit that Exhibit 1 attached to the complaint is a copy of a letter sent by the Health Commissioner of the City of Madison to the plaintiff herein on or about March 12, 1948.

5. Defendants deny that they have information or knowledge sufficient to form a belief as to whether the plaintiff is engaged in the purchase of Grade A milk from farm producers or in the pasteurization thereof or in the sale of said pasteurized milk to retail stores in cities or village in the states of Illinois or Wisconsin and, consequently, deny the same and leave plaintiff to its proof thereof. Defendants further allege upon information and belief that even if plaintiff deals in Grade A milk, plaintiff also deals in milk other than Grade A.

74 6. Defendants admit that the said application of the plaintiff for its said license was denied because plaintiff's pasteurization plant was located in Chemung, Illinois, more than five miles from the central portion of the City of Madison, otherwise known as the Capitol Square and at a distance of about 75 miles from Madison; but defendants allege that the said fact of location of the plaintiff's plant was the only fact considered in denying the plaintiff's application and further allege that they cannot now state that any further application for a license which might

Rec. Page

be made by the plaintiff would be granted, except for the fact of location of the plaintiff's plant.

7. Defendants deny that they have any information or knowledge sufficient to form a belief as to whether the milk which plaintiff intended to sell in the City of Madison, if its application for license had been granted, would comply or still does comply with the requirements of said ordinances of the City of Madison as to place of production, pasteurization, or requirements as to quality or sanitary conditions and consequently deny the same and leave plaintiff to its proof thereof. Upon information and belief, defendants allege that plaintiff maintains that the milk it intended to sell in the City of Madison is produced in conformity with the ordinances of the City of Chicago, Illinois and defendants deny upon information and belief that the requirements of the Chicago Ordinances are equivalent to the requirements of the ordinances of the City of Madison as adopted on or about August 27, 1949, as hereinafter more fully set forth.

8. Defendants further deny that they have any information or knowledge sufficient to form a belief as to whether, if the said license had been issued to plaintiff, it was plaintiff's intention to obtain the milk which it intended to sell in the City of Madison from its pasteurization plant in the City of Chemung, Illinois, after the same had been bottled and placed in paper cartons and then packed into a refrigerated truck and transported from said City of
75 Chemung, Illinois and sold to various retail grocers in the City of Madison and consequently deny the

Rec. Page

same and leave plaintiff to its proof thereof. Defendants admit that such an intention had been expressed by plaintiff to the City authorities but allege, upon information and belief, that the plaintiff does in fact operate pasteurization plants other than that located in the City of Chemung, Illinois and that the milk from such other pasteurization plants is bottled in containers similar to those used at its Chemung plant, so that if the plaintiff were permitted to sell milk in the City of Madison, it would be difficult for city authorities to determine whether milk sold in the city had actually been processed and bottled at the Chemung, Illinois plant of plaintiff and whether it had actually been produced at inspected farms and was all Grade A milk.

9. Defendants admit that plaintiff has requested the City Council of the City of Madison to amend its ordinances to eliminate the requirements that pasteurized milk sold in the City of Madison must be pasteurized within five miles of the central portion of the city, and further admit that the said City Council did hold open hearings upon the said request and that at such hearings the plaintiff appeared through its agents and attorneys and, among other arguments, did maintain that the said ordinance was unconstitutional. Defendants allege, however, that after full, due and open consideration of the said request and said arguments, the City Council declined so to amend the ordinances. Defendants deny that plaintiff has made any formal application for license since the application of March, 1948.

10. Answering the allegations of paragraph 9 of

Rec. Page

the second amended complaint, defendants admit that a milk license was not issued to the plaintiff and further admit that on or about August 27, 1949 a new milk ordinance as adopted by the City Council of the City of Madison took effect and that the copy attached to the second amended complaint as Exhibit B is a copy of such new ordinance and that said new ordinance in Section 7.21 reenacted the provision of the prior ordinances that it was unlawful for milk to be
76 sold in the City of Madison which had not been pasteurized in the said five mile zone.

11. Defendants deny that the said provision of the old ordinance or the said provision of the new ordinance of August 27, 1949 violates any provision of the Constitution of the United States or of the amendments thereto or of the Constitution of the State of Wisconsin in any respect whatsoever.

12. Defendants admit plaintiff's request for license was denied on or about March 12, 1948 and that defendants then took, and still take, the position that plaintiff is not entitled to sell milk in the City of Madison because its pasteurization plant is not located within the said five mile zone and further admit that plaintiff contends that the said provision is unconstitutional and admit that there now exists a controversy between plaintiff and defendants as to the legality of said provision.

13. Defendants admit that said Section 7.20 of the Ordinance of August 27, 1949 contains the provision as set forth in paragraph 12 of the second amended complaint; and defendants allege that substantially similar information had been required by the Madison

Rec. Page

Health Department upon application for dairy plant licenses under the ordinances as they existed prior to August 27, 1949. Defendants deny that they have any information or knowledge upon which to form a belief as to whether the plaintiff is able, ready or willing to make a new application for license or to pay the $1.00 or to furnish information called for by the present ordinances and allege that no application has been made by the plaintiff since March, 1948. Defendants admit that they take the position that they are not obligated to inspect plaintiff's plant or to issue license to said plaintiff because plaintiff's pasteurization plant is not located within said five mile zone, *and also for other reasons.*

14. Defendants deny that they have any information or knowledge sufficient to form a belief as to whether the farms from which plaintiff obtains milk for its pasteurization plant at Chemung, Illinois or
77 the vehicles in which the milk is delivered are inspected weekly or at any other intervals by inspectors hired by the plaintiff or are inspected by the City of Chicago, Illinois. Upon information and belief, defendants deny that the City Ordinances of Chicago, Illinois contain provisions equivalent to the present Ordinances of the City of Madison for insuring purity, quality and sanitation of milk. Defendants deny any information or knowledge sufficient to form a belief as to whether plaintiff's milk is Grade A milk as provided in the United States Model Milk Ordinance promulgated by the United States Public Health Service or whether the plaintiff's milk or milk products are pasteurized, produced, bottled, trans-

Rec. Page

ported or inspected in compliance with any United States Model Milk Ordinance and consequently deny the same and leave the plaintiff to its proof thereof. Defendants deny that the provisions of any United States Model Milk Ordinance are equivalent to the present ordinances of the City of Madison for insuring purity and sanitation of milk. Defendants admit that no attempt has been made by or on behalf of the City of Madison to inspect its plant or vehicles in which said milk is transported, and further admit that the City has made no attempt to satisfy itself that the milk was produced, pasteurized or transported pursuant to inspection of the City Ordinance of the City of Chicago; and defendants deny that the Ordinances of the City of Chicago have any materiality in this controversy and further deny upon information and belief that the Chicago Ordinances are equivalent to those of the present Madison Ordinances. Defendants deny that they have any knowledge or information sufficient to form a belief as to whether the inspectors of the City of Chicago are qualified to make inspections under or to carry out the provisions of the Chicago Ordinances or whether their inspections are accepted or approved by other cities or communities and consequently deny the same and leave the plaintiff to its proof thereof; but defendants deny that the said facts, if true, have any materiality in this con-
78 troversy. Defendants admit they have taken no steps to satisfy themselves as to the purity, quality or sanitation of the plaintiff's milk and further admit that they do not propose to do so and that they claim they have the right not to do so and further have the

Rec. Page

right to refuse to grant any license to the plaintiff because the plaintiff's milk is not pasteurized within the five mile zone as provided in the Madison City Ordinances, and *also for other reasons.*

15. The defendants admit that Section 7.25 of the Madison Ordinances adopted August 27, 1949 contains the provisions as set forth in paragraph 14 of the second amended complaint. The defendants admit upon information and belief that the Milk Ordinance and Code prepared by the United States Public Health Service contain the provision in Section 11 thereof and the comment thereto all as alleged in paragraph 14 of the second amended complaint; but defendants allege that the City Council of the City of Madison refused to adopt said Section 11 and adopted in lieu thereof the five mile pasteurization limit as contained in Section 7.21 of the present Madison Ordinances. Defendants deny that any provisions of the said Milk Ordinance and Code as prepared by the United States Public Health Service are binding upon the City of Madison in any respect unless they have specifically been adopted by the City of Madison as part of its ordinance and further deny that any such provisions not so adopted by the City of Madison have any materiality in this controversy. Defendants deny that they have any information or knowledge sufficient to form a belief as to whether plaintiff's milk or milk products have been awarded a rating of better than 90 per cent by any State Control Agency.

16. Answering the allegations of paragraph 15 of the second amended complaint, defendants deny that

Rec.
Page

they have any information or knowledge sufficient to form a belief as to whether the milk the plaintiff proposes to sell in the City of Madison meets all the requirements of the Madison Ordinances, except pasteurization within the five mile zone, or whether the plaintiff sells milk in 200, or any other number,
79 of municipalities in the State of Illinois and the State of Wisconsin or whether the health officials of the City of Chicago are enforcing the provisions of the Chicago Ordinances on the production and processing and distribution of milk and consequently the defendants deny the same and leave plaintiff to its proof thereof; however, defendants deny that such sale in such other municipalities or in the City of Chicago or any enforcement of Chicago Ordinances by Chicago officials have any materiality in this controversy. Defendants admit upon information and belief that the plaintiff sells its milk in the City of Chicago, but deny that that fact has any materiality in this controversy. Defendants deny that the health officer of the City of Madison could by any means other than continual inspection of the plaintiff's plants and of the several hundred farms which deliver to those plants satisfy himself that the plaintiff's milk is being produced, pasteurized and distributed in the manner required by the Ordinances of the City of Madison, and defendants allege that such continual inspection would create undue expense and inconvenience to the City of Madison. Defendants deny that inspection by the plaintiff or by other municipalities has any materiality in this controversy and further deny that they have any information or

Rec. Page

knowledge sufficient to form a belief as to whether the plaintiff's milk meets the requirements of the said
79 Ordinances and Code prepared by the United States Public Health Service and defendants deny upon information and belief that the provisions of that ordinance and code are equivalent to the provisions of the Madison Ordinances.

And further answering the second amended complaint of the plaintiff, defendants allege as follows:

17. The ordinances of the City of Madison and specifically including the portion in Section 7.21 thereof constitute necessary, reasonable and proper health regulations for the protection of the lives and health of the residents of the City of Madison. Milk and its products are not only one of the most im-
80 portant human foods but also the most perishable and most easily contaminated. Establishment and enforcement of rigid standards and continual inspection are required at all stages of production, transportation and sale of milk to assure an adequate supply of sanitary, healthful milk.

18. The City of Madison is located in almost the geographical center of Dane County, which has an area of approximately 1230 square miles and is one of the greatest milk producing counties in the entire United States. Dane County contains approximately 5600 separate farms which annually produce about 650,000,000 pounds of milk; and the City of Madison, including the University of Wisconsin with its own processing plant located in the City, consumes the milk production of only about 500 of those farms in an annual amount of about 60,000,000 pounds of

Rec. Page

milk, all as defendants are informed and verily believe. Other counties immediately adjoining Dane County are also very great producers of milk. Great quantities of milk produced in Dane and surrounding counties are also shipped to the Metropolitan Chicago markets and are also made into cheese, butter and evaporated, condensed and dried milk. All milk now sold as pasteurized milk in the City of Madison, being nearly all milk sold in the city, is now pasteurized and bottled at three separate plants all located within five miles of the Capitol Square in Madison and owned and operated by three separate companies. The natural result of the plants being located this near to the city and in the center of the tremendous milk producing area in Dane County, is that all milk pasteurized in those plants and sold in the City of Madison is produced on farms located within Dane County and within a radius of not more than twenty-five miles from the Capitol Square in Madison. Inspection by city health authorities of not only the pasteurization plants but also of all farms which supply those plants is thus made convenient and efficient and the cost of such inspection to the city and its taxpayers is kept within reasonable bounds, and the city is assured of an adequate supply of healthful and sanitary milk from known and inspected sources, all as these de-
81 fendants are informed and verily believe.

19. Defendants are informed and verily believe that approximately 800 or more farms, located chiefly in the State of Illinois many miles from Madison, furnish milk to the plants of plaintiff. Because it is impracticable to segregate in any plant, the milk from

Rec. Page

particular farms delivering to the plant, in order to be assured that standards of milk production, processing and transportation required by the Madison ordinances are maintained, as to any milk delivered from such plant to the City of Madison it would be necessary for the city health authorities regularly to inspect the said plants and 800 or more farms delivering to them, even if the amount of milk from said plants sold in the City of Madison is very small, as defendants are informed and verily believe.

20. Without the portion of the Madison Ordinances which is complained of in plaintiff's complaint, any dairy company with a plant located any place in the country could demand a license to sell milk in the City of Madison which had been pasteurized and bottled in such plant, and no matter how small the quantity of milk that was so sold from such plant, the city would then be put to the unreasonable burden of frequent inspection and supervision of not only the plant itself but all of the farms delivering milk to such plant.

21. The Madison Health Department has on its staff two trained expert dairy sanitarians whose duties include the inspection of milk sold in Madison, of the dairy plants delivering to Madison and the farms delivering to such plants, which farms number approximately 400, other than those supplying the University of Wisconsin. Each of the three local dairy companies now selling milk in Madison, exclusive of the University, and none of which companies is in any way financially connected with any other, also maintains a field man for farm inspection

Rec. Page

as does the farmers cooperative association, which represents many of the farmers delivering milk to the present Madison dairy companies; and these
82 field men, who are familiar with Madison Health Department requirements, cooperate with the Madison Health Department in maintaining standards of production required by Madison Ordinances, all as defendants are informed and verily believe. If plaintiff were permitted to sell milk in Madison it would, without doubt, require at least two or more additional full time qualified dairy sanitarians on the staff of the City Health Department, adequately to inspect the plaintiff's plants and the farms delivering to them; thus unreasonably adding to the inconvenience and cost of milk inspection.

22. Changing economic conditions frequently may cause operators of dairy plants which serve other than established local markets, and particularly operators of plants which may have a variety of markets available to them, to shift from market to market from time to time, as defendants are informed and verily believe. If plants so operated and located at a distance from Madison are permitted to supply milk to Madison, such operations and the frequent fluctuation in inspection responsibilities of the City in the inspection of said plants and the farms supplying them would unreasonably burden the City of Madison.

Wherefore, the defendants pray that judgment be entered declaring the portion of the Madison Milk Ordinances as set forth in the first cause of action of plaintiff's second amended complaint to be consti-

Rec.
Page

tutional and valid, and for their costs and disbursements in this action and for such other and further relief as may be proper herein.

83 SECOND CAUSE OF ACTION.

And as and for an answer to the second cause of action contained in the second amended complaint of the plaintiff, defendants allege as follows:

23. In answer to paragraphs numbered 1, 2, 4, 6, 7, 14 and 15 of the first cause of action as realleged and incorporated in the second cause of action, the defendants reallege all matters contained in this answer in paragraphs numbered 1, 2, 4, 5, 7, 8, 15, 16; and defendants further reallege the allegations of paragraphs 17, 18, 19 and 21, hereinbefore set forth.

24. Defendants admit that their answer to the original complaint herein contained the allegations as set forth in paragraph 2 of the second cause of action in the second amended complaint together with other allegations and that plaintiff now takes the position that the method set forth in the Model Milk Ordinance promulgated by the United States Public Health Service is an adequate way to insure purity of milk sold in Madison, but defendants allege that the City Council of Madison has refused to incorporate in its Ordinance the provisions of the so-called Model Milk Ordinance relied on by plaintiff and defendants further deny upon information and belief that the methods set forth in the so-called Model Milk Ordinance are adequate to insure the

purity and sanitation of milk sold in Madison without continual inspection of milk plants and farms delivering thereto by the Health Department of the City of Madison.

25. Defendants admit that while this litigation was pending the City of Madison adopted the Ordinances attached to plaintiff's second amended complaint as Exhibit B and that the said new Ordinances contained the provisions contained in paragraphs 3 and 4 of the plaintiff's second amended complaint. Defendants further allege that for many years prior to the adoption of the said new ordinances the City of Madison had required permits issued by its Health Departments to farms whose milk was delivered to Madison and that approximately the same information had been required as is set out in paragraph 4 of the second cause of action of the plaintiff's second amended complaint.

26. The defendants admit upon information and belief that the plaintiff does not own the farms from which it obtains the milk which it pasteurizes at its plants located at Chemung, Illinois and elsewhere and that it obtains milk from approximately 900 different farms located in Northern Illinois and Southern Wisconsin and all farms are more than 25 miles from the City of Madison, and that plaintiff does not obtain milk from any farm located within 25 miles from the City of Madison.

27. The defendants have no information or knowledge sufficient to form a belief as to whether the plaintiff's business is dependent upon obtaining milk from the milk producers located in Northern

Rec. Page

Illinois and Southern Wisconsin or whether the plaintiff is able, willing, or ready to have each of said owners of said farms where it obtains said milk make application to the City Health Department of Madison. Any application by the said farm owners to the City of Madison to deliver milk in Madison which milk has been pasteurized outside of the five mile pasteurization limit contained in Section 7.21 of the present Madison Ordinances would be denied; the City has had no occasion to consider any application by any of said farms for the delivery of milk which has been pasteurized within the said five mile limit.

28. The defendants admit that they take the position that the Madison Health Department has a discretion as to the inspection of farms located more than 25 miles from Madison and the issuance of permits to such farms and that it has the right to deny the issuance of permits to such farms and to deny plaintiff the right to sell its milk products made from milk produced on such farms, in the City of Madison and also for other reasons. The defendants deny that the said Ordinance or any part of it is in violation of the Constitution of the United States or any amendment thereto or of any provision of the Constitution of the State of Wisconsin.

85 29. Defendants deny that any action in refusing permits to such farms or to inspect such farms would be arbitrary, discriminatory or unreasonable, and further deny that any provision of Section 7.25 of the present Madison Ordinances effects this controversy in any respect or provides the Madison Health

Rec. Page

Department with adequate or reasonable means, with little expense of satisfying itself that the farms from which plaintiff obtains its milk are sanitary or operated in accordance with the provisions of the Ordinance of the City of Madison or that the milk produced thereon meets the requirements of the Ordinance of the City of Madison.

30. Defendants allege that in view of the great supply of milk available within a radius of 25 miles from the Capitol Square of the City of Madison, the provision of the Madison Ordinance that the City need not inspect or issue permits to farms located beyond that radius is entirely reasonable and a proper health regulation and that said provision aids the effectiveness of inspection by the City Health Department and minimizes the cost thereof to the City and its tax payers.

31. So long as the five mile pasteurization limit contained in Section 7.21 of the present Madison Ordinances remains in effect, these defendants deny that there is any controversy between the parties as to the validity of the provisions of Section 7.11 of the Ordinances complained of by plaintiff in its second cause of action because at no time has the plaintiff given any indication that it proposes to pasteurize its milk within the said five mile limit or at any other place in the State of Wisconsin; hence so long as the provisions of Section 7.21 of the Madison Ordinance are in effect there is no necessity for the rights of the plaintiff to be declared under Section 7.11 of the Madison Ordinances.

Wherefore the defendants pray that if the validity

Rec. Page

of Section 7.21 of the Madison Ordinance as contested in the first cause of action herein is sustained, the second cause of action be dismissed on the grounds that there is no controversy between the parties; and
86 if the validity of the Ordinance involved in the first cause of action should not be sustained, then that the Court adjudge that Section 7.11 of the City Ordinance be construed as giving the Madison Health Department discretion not to inspect farms located beyond said 25 miles limit and declare that the said provision of Section 7.11 of the Ordinance is constitutional and valid; and that defendants have the costs and disbursements of this action.

Harold E. Hanson,
City Attorney,
Madison, Wisconsin.

103 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT.

The above entitled declaratory judgment action coming on for trial at the September, 1949, term of said Court and having been tried before the Court on the 10th and 11th days of October, 1949, Jacob Geffs and Eli Block, of McGowan, Geffs, Geffs & Block, of Janesville, Wisconsin, appearing for plaintiff, Dean Milk Company, and Harold E. Hanson for the defendants, and after hearing the allegations and proofs of the parties, the arguments of counsel and being advised in the premises, I hereby make and file the following Findings of Fact, Conclusions of Law and Order for Judgment, constituting my decision in said action.

Rec. Page

Findings of Fact.

1. That the plaintiff is an Illinois Corporation having its main business offices in the City of Chicago, Cook County, Illinois, and that it operates a milk pasteurization plant in the City of Chemung, Illinois.

2. That at the times hereinafter mentioned the defendants were the executive, legislative and administrative officers of the City of Madison, Dane County, Wisconsin, and that the City of Madison, Wisconsin, is a municipal corporation.

104 3. That at the times hereinafter mentioned there was and there still is in force an ordinance adopted by the Common Council of the City of Madison on February 14, 1930, which is now numbered section 7.21 of the General Ordinances of the City of Madison adopted August 27, 1949, providing:

> "Section 1. Section 43 of Subsection E of Ordinance Number 2183, entitled 'An Ordinance Amending the General Ordinances of the City of Madison relating to the License for Sale of Milk and Cream,' is hereby amended by inserting before the first sentence thereof the following: 'It shall be unlawful for any person, association, or corporation to sell, offer for sale or have in his or its possession with intent to sell or deliver in the City of Madison, any milk or milk products as pasteurized unless the same shall have been pasteurized and bottled in the same manner provided in this ordinance within a radius of five miles from the central portion of the City of Madison, otherwise known as the Capital Square, at a plant the machinery, equipment and facilities of which shall have been approved by the Health Department."

Rec. Page

That said ordinance is a portion of the ordinances of the City of Madison dealing with the entire subject of sale of milk and dairy products within the city and including standards for production, processing, manufacturing, transportation, handling, sale and delivery of milk and dairy products and requiring regular inspection by the city Health Department of all dairy plants and all farms on which milk is produced for sale in the City of Madison.

4. That the plaintiff, Dean Milk Company, is engaged in the purchase of milk from farm producers and in the pasteurization thereof, and in the sale of said pasteurized milk to retail stores in cities and villages in the states of Illinois and Wisconsin; that on the 8th day of March, 1948, the plaintiff herein made application to the City of Madison for a license to distribute pasteurized Grade "A" Milk, cream and milk products in the City of Madison and that on or about the 12th day of March, 1948, the plaintiff, Dean Milk Company, was notified by the Health Commissioner of the City of Madison that its application for a license was denied.

105 5. That the application of plaintiff for said license was denied because plaintiff's pasteurization plant was located in Chemung, Illinois, more than five miles from the central portion of the City of Madison, otherwise known as the Capitol Square and at a distance of about seventy-five miles from Madison.

6. Madison's five mile pasteurization ordinance simplifies the inspection of plants by requiring them to be near at hand thus permitting more intense and constant inspection than if such establishments were

located anywhere in the United States, and minimizes the expense of inspection.

7. That section 7.21 of the General Ordinances of the City of Madison constitutes a reasonable and proper health regulation for the protection of the lives and health of the residents of the City of Madison.

8. That the City of Madison is located in almost the geographical center of Dane County, which has an area of approximately 1230 square miles and is one of the greatest milk producing counties in the entire United States. Dane County contains approximately 5600 separate farms which annually produce about 650,000,000 pounds of milk and the City of Madison, including the University of Wisconsin with its own processing plant located in the city, consumes the milk product of only about 500 of those farms in an annual amount of about 60,000,000 pounds of milk. Other counties immediately adjoining Dane County are also very great producers of milk. Great quantities of milk produced in Dane and surrounding counties are also shipped to the Metropolitan Chicago markets and are also made into cheese, butter, evaporated, condensed and dried milk. All milk now sold as pasteurized milk in the City of Madison, being nearly all the milk sold in the city, is now pasteurized and bottled in three separate plants all located within five miles of the capital square in Madison and owned and operated by three separate companies. The natural result of the plants being located this near to the city and in the center of the tremendous milk producing area in Dane County, is that all milk pas-

Rec. Page

teurized in those plants and sold in the City of Madison is produced on farms located within Dane County and within a radius of not more than twenty-five miles from the capital square in Madison. Inspection by city health authorities of not only the pasteurization plants but also of all farms which supply those plants is thus made convenient and efficient and the cost of such inspection to the city and its taxpayers is kept within reasonable bounds, and the city is assured of an adequate supply of healthful and sanitary milk from known and inspected sources.

9. That plaintiff does not intend to pasteurize milk within five miles of the central portion of the city, otherwise known as the capital square, and has no rights, status or other legal relations affected by that portion of section 7.11 of the General Ordinances of the City of Madison which reads as follows:

> "The health department shall not be obliged to inspect and issue permits to farms located beyond twenty-five (25) miles from the central portion of the City of Madison, otherwise known as the Capital Square."

Conclusions of Law.

1. That defendants, the City of Madison, Wisconsin, a municipal corporation, Dr. C. R. Kindaid, as Health Commissioner for the City of Madison, Wisconsin, Leonard Howell, as City Manager of the City of Madison, Wisconsin, and the Common Council of the City of Madison, Wisconsin, are entitled to a declaratory judgment in this action adjudging and decreeing that section 7.21 of the General Ordinances of the City of Madison providing:

Rec. Page

107

> "*Pasteurization Plants to be Within Five Mile Radius.* It shall be unlawful for any person, association or corporation to sell, offer for sale or have in his or its possession with intent to sell or deliver in the City of Madison, any milk, cream, or milk products as pasteurized unless the same shall have been pasteurized and bottled in the manner herein provided within a radius of five miles from the central portion of the City of Madison otherwise known as the Capital Square, at a plant housing the machinery, equipment and facilities, all of which shall have been approved by the Department of Public Health,"

is constitutional and a valid regulation under the police power for the protection of the public health and welfare and the application of the plaintiff, The Dean Milk Company, for a license to distribute pasteurized milk, cream and cream products in the City of Madison was properly denied.

2. That no justiciable controversy exists between the parties as to the construction or validity of that part of section 7.11 of the General Ordinances of the City of Madison providing:

> "The health department shall not be obliged to inspect and issue permits to farms located beyond twenty-five (25) miles from the central portion of the City of Madison, otherwise known as the Capital Square,"

and the second cause of action contained in plaintiff's second amended complaint should be dismissed.

Order for Judgment.

Let a declaratory judgment be entered accordingly. Further adjudged and declared that the second

Rec. Page

cause of action of plaintiff's second amended complaint be and the same is hereby dismissed.

Dated December 30, 1949.

By the Court,
Alvin C. Reis
Circuit Judge.

109 DECLARATORY JUDGMENT AND JUDGMENT DISMISSING SECOND CAUSE OF ACTION OF PLAINTIFF TO SECOND AMENDED COMPLAINT.

This cause having been tried to the Court and the Court having made and filed its Opinion in writing and its Findings of Fact and Conclusions of Law;

Now, Therefore, on motion of Harold E. Hanson, City Attorney for the City of Madison;

It Is Adjudged, And Decreed:

That defendants, the City of Madison, Wisconsin, a municipal corporation, Dr. C. R. Kincaid, as Health Commissioner for the City of Madison, Wisconsin, Leonard Howell, as City Manager of the City of Madison, Wisconsin, and the Common Council of the City of Madison Wisconsin, are entitled to a declaratory judgment in this action adjudging and decreeing that section 7.21 of the General Ordinances of the City of Madison providing:

"*Pasteurization Plants to be Within Five Mile Radius.* It shall be unlawful for any person, association or corporation to sell, offer for sale or have in his or its possession with intent to sell or deliver in the City of Madison, any milk, cream,

Rec. Page

or milk products as pasteurized unless the same shall have been pasteurized and bottled in the manner herein provided within a radius of five
110 miles from the central portion of the City of Madison otherwise known as the Capital Square, at a plant housing the machinery equipment and facilities, all of which shall have been approved by the Department of Public Health,"

is constitutional and a valid regulation under the police power for the protection of the public health and welfare and the application of the plaintiff. The Dean Milk Company, for a license to distribute pasteurized milk, cream and cream products in the City of Madison was properly denied.

That no justiciable controversy exists between the parties as to the construction or validity of that part of section 7.11 of the General Ordinances of the City of Madison providing:

"The health department shall not be obliged to inspect and issue permits to farms located beyond twenty-five (25) miles from the central portion of the City of Madison, otherwise known as the Capital Square,"

and the second cause of action contained in plaintiff's second amended complaint is hereby dismissed.

Dated at Madison, Wisconsin, this 30 day of December, 1949.

Myrtle L. Hansen,
Clerk, Circuit Court,
Dane County, Wisconsin.

Rec. Page

122 BILL OF EXCEPTIONS

119 DR. C. K. KINCAID, called as an adverse witness by the plaintiff testified as follows:

My name is Charles K. Kincaid, M.D. I am the City Health Commissioner of the City of Madison, Wisconsin.

120 I received my M.D. at Ohio State in 1935; M.S. in Public Health, Michigan 1940; interned at Methodist Hospital in Indianapolis; public health training in the District Health Department in Indiana; I took a job as City-County Health Officer in Eau Claire in 1941 where I stayed until September 1947 except 3 years in the service. Then I went to Will County, Illinois, as County Health Officer in September, 1947, and left there to take my present position in July of 1948.

121 The Clerk's office of the City of Madison has just received a copy of the United States Public Health Milk Ordinance and Code which is provided for by the present Milk Ordinance of Madison.

Exhibit 1 and Exhibit 2 are the United States Public Health Service Milk Ordinance and Code and proposed amendments referred to in the present Madison Milk Ordinance.

122 Exhibit 1 and Exhibit 2 admitted in evidence.

The history and function that the U. S. Model Milk Ordinance plays in the inspection of milk is as follows:

In 1922 the Public Health Service, realizing that there was considerable discrepancy from community to community and state to state, felt that they should

Rec. Page

recommend some sort of a standard by which farms and plants would be required to set up reasonably similar requirements since milk was milk and that ordinance has been recommended for that purpose to communities ever since 1922. It has been occasionally revised.

123 When we revised the Madison Ordinance August 27, 1949, we did not have available Exhibit 2.

Some of the improvements over Exhibit 1 we felt was the definition of milk and milk products.

124 In addition to the definition of certain products which we felt were needed and which are, we believe, to be considerably improved in the Madison Milk Ordinance, it also requires that wells on farms be so constructed as to conform to the Wisconsin Well Code. The revised edition of the U. S. Model Milk Ordinance provides:

> "The water supply shall be easily accessible, adequate, and of a safe sanitary quality".

125 The Madison Ordinance is specific rather than general; the Wisconsin Well Code requires well should be routed in solid rock, casting extending 6 inches above the ground surface, annular spaces closed and platform so constructed as to prevent the entrance of surface water to the well.

I was health officer of Will County, Illinois, which is south of Chicago.

127 Will County was not controlled by the Chicago Ordinance, but by a state-wide Grade A which was a voluntary statute. It permitted any single milk plant in Will County to meet the provisions of Grade

Rec.
Page

A. These requirements were not the same as the Chicago ordinance but were worded as the exhibit "safe, sanitary".

My experience was that a general requirement does not give the health officer enough specific information.

128 There was only one plant in Joliet meeting these requirements when I was there. I do not know how many farms had fixed up their wells. There were many that needed some work. It is impossible for me to say without asking our sanitarian how many farms in Dane County under my supervision are complying with the well code provision of the Madison ordinance. All of the 400 farms that are being inspected by my office will probably never comply with this provision. We hope to have 90% complying within a year or so as to make it a Grade A shed. You never obtain 100% compliance in any milk shed.

129 The next item on my list which I consider an upward revision is requirement that the hall connecting the milk house to the barn be entirely open or at least one side; the U. S. Model Milk Ordinance provides that there be a hallway 6 feet wide or more with self-closing doors; the Madison Ordinance, however, is merely a recommendation not a requirement.

The next item is a trap drain for the milk house floor to carry off waste water.

130 The U. S. Model Milk Ordinance provides that the water be carried away so as not to cause a puddle of nuisance. We believe the trapping is an improvement. There are 500 farms under my inspection in

Rec. Page

Dane County and I believe 50% of them comply with this provision. The U. S. Model Milk Ordinance provides for proper drainage and the Madison specifies a kind of proper drainage.

131 The last note I have here, the local ordinance provides for Grade A pasteurized milk only, which is not an actual upward revision because the standard ordinance (U.S. Model Code) leaves that section open for the people of the city but that is a difference. Our ordinance closes the door to any but Grade A pasteurized milk.

The cooling requirement of pasteurized milk of 60 degrees is the same in the U. S. Model Ordinance as in ours. The purpose of cooling milk after it is milked is to stop the growth of bacteria in the milk. The Madison Ordinance limits the number of bacteria to 30,000 per c.c. in the finished bottle.

There are no other differences that I recall. There are some other of minor importance.

Q. That is all you can recall and if this man can help you let's get them out in the open.

A. That is all.

132 Over the course of years there has been between 1500 and 2000 cities that have adopted the U. S. Model Milk Ordinance.

133 Q. Doctor, in regard to Grade A pasteurized milk, in your opinion do you believe that the revised milk ordinance recommended by the United States Public Health Service, Exhibit 2, provides for reasonably adequate and safe regulation for the receiving city that receives milk? A. If this is enforced with effectiveness, yes.

Rec. Page

Q. Now, Doctor, I want to ask you about the enforcement of it. It is a fact that the United States Public Health Service, in conjunction with the state boards of health, conduct spot surveys and make tests to determine the efficiency of enforcement in the various areas of the country. That is enforcement in the producing area. Is that correct?

A. They do on request of a receiving city and they do routinely, sometimes, too.

Q. Your answer is yes, they do conduct tests in the producing area? A. Yes.

Q. And they will give the receiving city, free of charge, all of the information that they have on any producing area in question, is that correct?

A. Through the particular state board of health.

134 Q. Then you could request the State Board of Health here in Wisconsin to get the information for you, and they could get the information for you, is that correct? A. Yes, sir.

Q. And get it for you free of charge?

A. Yes, sir.

Q. Where did my Exhibit 1 go to? Somebody grab it?

(Paper handed to counsel.) Now, Doctor, I call your attention to Section 11 of the model milk ordinance and will you read the ordinance, part of Section 11? A. (Reading.) "Milk and milk products from points beyond the limits of routine inspection of the city of Blank may not be sold in the city of Blank or its police jurisdiction, unless produced

135 and/or" (to the Reporter). I will give you this—"an-

Rec. Page

less produced and/or pasteurized under the provisions equivalent to the requirements of this ordinance; provided that the health officer shall satisfy himself that the health officer having jurisdiction over the production and processing is properly enforcing such provisions."

Q. Now, Doctor, will you read the suggestion that is made under Section 11 by the United States Public Health Service? A. (Reading.) "It is suggested that the health officer approve milk or milk products from distant points without his inspection if they are produced and processed under regulations equivalent to those of this ordinance, and if the milk or milk products have been awarded by the State control agency a rating of 90 per cent or more on the basis of the Public Health Service rating method. Subsection 29."

Q. Now, Doctor, will you read Section 11 of Exhibit 2, "Revised milk ordinance recommended by the U. S. Public Health Service"?

A. (Reading.) "Milk and Milk Products From Points Beyond The Limits Of Routine Inspection. Milk and milk products from points beyond the limits of routine inspection of the municipality of Blank may not be sold in the municipality of Blank, or its police jurisdiction, unless produced and/or pasteurized under provisions which are substantially equivalent to the requirements of this ordinance and which are enforced with equal effectiveness as determined by a milk sanitation rating."

136 Q. Now, the rating that they refer to is the 90 per cent, is that correct? A. Yes, sir.

Rec.
Page

Q. Now, Doctor, I will ask you as an expert in this field; In your opinion do you think that a city could safely follow the provisions of Section 11 of the milk ordinance and code, the original one, and the revised one?

Mr. Hanson: I object to it as calling for a conclusion and being immaterial.

The Court: The objection is overruled.

A. Are you asking do I trust the United States Public Health Service?

Mr. Geffs: Q. That is it.

Mr. Hanson: I object to it for the further reason that there is no such provision in the Madison Milk
137 Ordinance. What difference does it make whether under some ordinance of Timbuktu they provide for reciprocal inspection?

The Court: The objection is overruled.

A. Yes, I think I can trust the United States Public Health Service:

Mr. Geffs: Q. And, in your judgment, a city could, with reasonable safety, follow the suggestions of this Section 11, is that correct?

Mr. Hanson: I object to it as immaterial.

The Court: The objection is overruled.

A. I am not sure I understand the question. Would you repeat it?

(Last question read.)

Mr. Geffs: Q. And, in your judgment, a city could, with reasonable safety, rely and depend upon this Section 11? A. For the protection of the public health?

Rec. Page

Q. For the protection of the public health.

A. It is a matter of opinion. I think so.

Q. That answers the question. Now, Doctor, when this ordinance was passed by Madison on August 27, 1949, prior to the passage of it you had some discussion, did you, with the council members and officials of Madison in regard to it? A. Yes, sir.

Q. Well, I call your attention to Section 7.21 which provides that pasteurization plants are to be within a 5 mile radius of the capitol square, and I
138 will ask you if you recommended that as a measure?

Mr. Hanson: I object to it as immaterial whether or not he recommended it.

The Court: The objection is overruled.

A. There had to be some paragraph concerning the inspection of plants located beyond the usual limits of inspection and two paragraphs were submitted to the council for their decision since I felt that I wasn't competent to decide that by myself. This present paragraph 7.21 was one of those that was submitted.

Mr. Geffs: Q. Then, I take it you did not recommend it. You say you did not feel competent to decide the question. You did not recommend this—

A. I recommended that the council choose one of the two paragraphs.

Q. What was the other one? A. The other one was similar to the Section 11 of the standard ordinance.

Q. But you did not make a definite recommenda-

Rec.
Page

tion that they accept this Section 7.21, the 5 mile limitation on the pasteurization plants?

Mr. Hanson: He just said he did.

Mr. Geffs: No, he said he submitted two.

Mr. Hanson: In the alternative.

Mr. Geffs: Let's let the doctor answer.

A. I did not specify which I preferred because I felt that milk to the consumers in Madison would be safeguarded adequately were either of those two selected.

139 Q. I see. Now, Doctor, the answer on the part of the defendant denies that the requirements of the Chicago Ordinance are equivalent to the requirements or standards of the City of Madison as adopted on August 27, 1949. Are you acquainted with the Chicago Milk Ordinance, Doctor? A. Not beyond the point I made a moment ago that it was my information that Chicago Ordinance now in effect was the 1935 edition of the standard ordinance.

(Exhibit 3, a letter, so marked for identification.)

Mr. Geffs: Q. Now, Doctor, I show you plaintiff's Exhibit 3 and will you read that letter? Read it out loud. Then I will ask you some questions.

A. (Reading.) "September 23, 1949. Dr. W. J. Corbett, Dean Milk Company, 1126 Kilbourne Ave-
140 nue, Rockford Avenue. Dear Sir: In reply to your telephone conversation, the following information is noted.

"The Dean Milk Company operating under permit from the Chicago Board of Health, which has adopted the recommended milk ordinance and code of the

Rec. Page

Public Health Service is included in the last survey rating of the Chicago milkshed made cooperatively by the Public Health Service and the Illinois State Department of Public Health.

"This survey gave a rating of raw milk sold to plants of 91.05% and a rating of pasteurization plants of 93.42%.

"Very truly yours, Harold Wainess."

142 The Madison Ordinance of August 27, 1949 provides for Grade A pasteurized milk. The U.S. Model Milk Ordinance provides for Grade A pasteurized milk and B or C or raw milk.

In order for milk to be graded Grade A milk which is sold here in the City of Madison and labeled Grade A milk, it must meet the requirements of August 27, 1949. There is no milk being sold today in the City of Madison that is labeled Grade A milk under the Madison ordinance.

143 There are five milk supplies here in Madison and one of them could qualify for Grade A milk but none of the dairies selling milk to the public in Madison is labeling their milk Grade A milk.

144 Since I have been Health Commissioner in Madison, there has not been for sale in Madison any milk labeled Grade A pasteurized milk.

I am the Commissioner of Health and there are 51 full time people and 24 part time and seasonable people on my staff. Of this number there are two men whose chief duty is milk sanitation.

145 In inspecting the 500 farms that supply milk to

Rec. Page

Madison, one spends full time and the second man spends all but one day a week on milk sanitation.

So that if the approximately 900 farms that the Dean Milk Company obtains milk from were located within 25 miles of the Capital Square, it would be necessary to hire more milk sanitarians if the farms were going to be inspected.

I do not know how large the Dean pasteurization plant at Chemung, Illinois, is, and hence I cannot say whether it would be a bigger job to inspect it than a plant here in Madison outside of the extra transportation.

146 Exhibit 4 reads:

A. "Commissioner of Health, Madison, Wisconsin;

"In re: Dean Milk Company.

"Dear Sir.

"Please deliver to bearer 950 blank applications to be filled out by the owners of the farms which supply the milk to Dean Milk Company, as required by your new milk ordinance of August 27, 1949.

"Very truly yours, McGowan, Geffs, Geffs & Block, Jacob Geffs."

147 I refused to supply 950 blanks because 1.—I didn't have that many on hand and 2—I understood there was a lawsuit pending regarding the 5-mile limit on pasteurization plants and saw no need of delivering the blanks until the validity of the 5-mile limit was determined.

Exhibit 4 received in evidence.

Rec. Page

Attached to the letter is an application blank which calls for information that would substantially comply with the present Madison ordinance.

148 *Direct Examination by Mr. Hanson.*

Q. Do you know what the provisions of the Chicago Milk Ordinance are in reference to the temperature at which milk must be cooled?

Mr. Geffs: Just a moment. I object to that. Let's put in the Chicago Ordinance and we have got it here, so we won't have to guess at these things.

Mr. Hanson: I object to the introduction of the Chicago Ordinance on the grounds it is immaterial. We are concerned here with the reasonableness of the Madison Ordinance.

The Court: The objection is overruled. You may introduce the Chicago Ordinance. If we are going to talk about it, we better see what it is.

150 Exhibits 5-17 both inclusive, received in evidence.

151 The Chicago Ordinance requires milk to be cooled to 65 degrees or less and the Madison requires 60 degrees or less.

152 It is my opinion that the Chicago Ordinance does not require a covered lip cap which is required in the Madison ordinance.

Q. Do you know anything about this spot check referred to by Mr. Geffs and used by the United States Public Health Administration for the purpose of checking plants and farms in the producing milk shed? A. Yes, sir.

Q. What is the machinery of that spot check?

Rec.
Page

How is it conducted? A. When an application is made to a health department from a plant outside usual limits of inspection, that health department requests its state health department for a survey rating of that plant in question. The state health department then requests the rating of the United States Public Health Service, who then go to the state in question, if it is another state, to their state health department, and the two of them go to the plant, if a rating of a specific plant has been requested, and after making a survey of the plant, they take the names of all the farms selling milk to that plant and select out of the hat what they hope will be a fair sample of all the farms and then inspect those farms, score the score of the plant, add the two
153 ratings, add to that the rating of the local health department's procedures in sanitation and laboratory procedures, whether or not they conform to standard methods, and the whole is averaged to yield the rating that has been mentioned.

In one community where one rating was made of farms there were 20 farms inspected out of a total of 135.

Q. Assuming a situation where a city in Wisconsin with that rating under a reciprocal inspection provision such as provided in the United States Health Code and they wanted to get the rating of some producing area down in Illinois and they went through the proper channels, would the United States health authorities send to the Wisconsin community a spot check that had been made in the past, or would they conduct a current check?

Rec. Page

A. If there had been a recent survey and rating of that specific plant, that would then be furnished. If the rating was older than a year, we could refuse to accept that as being too old. It is a matter of judgment enters in there. If they have a fairly recent rating, that is the one that is furnished.

Q. So that the check you would get unless a recent one was possible or forthcoming, might be a check over a year old and would be a sampling of a few
154 farms out of the total number and would be for a certain time rather than over a continued period of time? A. That is true because that rating is a rating of the local inspection methods, you see.

Q. And such a spot check might well skip or eliminate or not include a number of farms that were producing insanitary or unclean milk? A. There is that chance, yes, sir.

Cross Examination by Mr. Geffs.

Q. Now, you say there is that chance?

A. Yes, sir.

Q. But, in your judgment, the probabilities are it is fairly accurate and has proved so in the past, isn't that right? A. I am not familiar with the theories of samplying, but I know an attempt is made to arrive at a satisfactory accurate size of sample, but there is always that chance that surveys having their defects that we all know about, there is always the chance you might miss some.

155 Q. Doctor, you say the Chicago Milk Ordinance provides that the milk be cooled to 65 degrees or

Rec.
Page

less. I believe you testified that the purpose of cooling the milk was to stop the growth of bacteria,
156 is that correct? A. Yes, sir, to slow it.

Q. To slow it down. Your ordinance here provides for Grade A pasteurized milk that when the milk is sold on the market it must not contain more than 30,000 bacteria per cubic centimeter, is that right?

A. Yes, sir.

Q. Now, assuming that the milk sold here, the Dean Grade A pasteurized milk here shows a test not to exceed 10,000 bacteria per cubic centimeter, would you state in your opinion that the cooling to 65 degrees or less was adequate to answer the purpose? A. Not necessarily. Growth of bacteria in milk to be pasteurized must be kept down with all of our—all possible efforts because while a finished product might be 10,000 bacteria per cubic centimeter, milk coming into the plant of a high count would not be what we consider to be satisfactory quality. By that I mean to say that we don't want milk to appear on the market that is loaded with killed organisms. Killed organisms sometime cause upsets of the stomach and intestine just from the chemicals present, so in addition to the count in the finished product, the count of the milk in the raw milk in your plant should be kept as low as reasonably possible, also.

157 Q. But as we discussed this afternoon, the model milk ordinance adopts 60 degrees the same as yours.

A. The new amendment.

Q. The new amendment. Now, Mr. Hanson was

Rec.
Page

asking you about this rating furnished by the United States Public Health Service, and making the information available to receiving districts. How do they make that available, by letter or certificates, or how?

A. It is usually verbal and then confirmed by letter via the State Board of Health, of course.

Q. They do that in the regular course of business, do they? A. Yes, sir.

Q. And they furnish the information verbally, that is, "they," the United States Public Health Service, and then confirm it by letter? A. Yes.

Q. And that is their regular and usual manner of furnishing the information, is that correct?

A. In my limited experience, yes.

158 DR. W. J. CORBETT, called as witness on behalf of the plaintiff, testified as follows:

My name is Walter Corbett; I live in Rockford, Illinois; employed by Dean Milk Company; my duties are to supervise quality and direction of the laboratory for the Dean Milk Company; I supervise the incoming raw milk; I direct the laboratory personnel; I supervise the processing and quality of the finished product.

I specialized in dairy technology, and received a B.S. degree at the University of Illinois in 1934; M.S. degree University of Wisconsin, 1935; Ph.D.
159 University of Illinois, 1942; I majored in dairy technology; I am acquainted with the Chicago Milk Ordinance, and the regulations of the Chicago Board of Health. It is not possible to get a certified copy

Rec. Page

of the regulations of the Board of Health, but these regulations are enforced by the Health Department
160 of Chicago. These regulations deal with Dean Grade A pasteurized milk and milk products which the company proposes to sell in Madison, Wisconsin.

164 Dean Milk Company has permits from the Chicago Board of Health.

Q. Will you get those permits out for me, please?

A. Well, they are on the table.

Q. Get the original permits.

Mr. Hanson: I don't see how this is material. Assume a man applied to the building inspector of Chicago to build a house, then came up to Madison to build that house, he certainly would not be permitted to do it.

The Court: We have some doubts, Mr. Geffs, whether this is material. That is, Dean Milk Company may comply thoroughly with the Chicago Ordinance and they have good milk but yet the Madison Ordinance isn't an ordinance naming Dean Milk
165 Company. There may be 99 other milk distributors down there affected by this 25 mile provision in the Madison Ordinance. It is granted your company complies with the Chicago Ordinance and that you have good milk. What does it prove as to the validity of the Madison Ordinance?

Mr. Geffs: The Supreme Court of Illinois has just ruled that those limitations, both of them, that they contain here, are unconstitutional. That is a late decision by the Supreme Court of Illinois in which they discuss this Dyer case. It isn't in the advanced

Rec. Page

sheets yet. I have a copy, if your Honor would be interested in it. (Passing paper to the Court.)

The Court: Thank you.

Mr. Geffs. Then there is a late case from Texas on exactly the same thing. And these cases hold, your Honor, that it is up to the city that tries to build a trade barrier around it, the burden of proof is on the city to show the necessity of it. The burden is on the defendants here to show that our milk is not good milk.

The Court: That is not the question. The question is the validity of the Madison Ordinances, not whether your milk or the milk of 10,000 individual distributors throughout the United States is good.

Mr. Geffs: Here is the issue raised by the pleadings. They say in their answer, your Honor, that they have got to inspect each and every farm to insure a pure and sanitary grade of milk. We say that the Section 11, reciprocal—the model milk or-
166 dinance is a satisfactory manner and their own health commissioner testified it was satisfactory to him on the witness stand here.

The Court: Suppose you prove that the New York Milk Company complied with the New York Ordinance, what would that prove as to the validity of the Madison Ordinance?

Mr. Geffs: It proves this—

The Court: It proves the New York company is probably selling good milk.

Mr. Geffs: Yes, it proves that and in fact here, your Honor, the State Department of Agriculture

Rec.
Page

here in Madison right now is framing regulations for inspection of interstate milk so that Wisconsin milk can be sold on Wisconsin inspection in Dallas, Texas, or Birmingham, Alabama, and all through the South, and what has happened, your Honor, I suppose at one time there wasn't any other method of insuring pure milk except on inspection, but the last few years there has grown up this reciprocal inspection and which Dr. Kincaid testified 2,000 cities accepted it and we will have witnesses of other cities that have accepted it and have found it satisfactory. Now, we say that being the case, Madison can't draw a 5 mile limit around themselves and say "Stay out", under the Constitution of the United States. It violates the Interstate Commerce Law. That case holds that.

167 Exhibit 18, certified copy of the Milk Pasteurization Law of the State of Illinois, received in evidence.

Exhibit 19, certified copy of the Grade A Pasteurization Law and Grade A Milk Products Law of the State of Illinois received in evidence.

168 The following exhibits identified by witness:

Exhibit 20, Chicago Milk Plant Permit #38.

Exhibit 21, Chicago Milk Plant Permit #37.

Exhibit 22, Chicago Milk Receiving Station Permit #1619.

Exhibit 23, Chicago Milk Distributor Permit #1521.

Exhibit 24, Chicago Milk Receiving Station Permit #1578.

Rec. Page

Exhibit 25, Chicago Milk Receiving Station Permit #1534.

169 These permits are current and in good standing.

Exhibits 20 through 25 inclusive received into evidence.

Exhibit 26, Illinois Department of Public Health Certificate of Approval.

The following exhibits marked for identification:

Exhibit 26, Certificate of approval issued by Illinois Board of Public Health to Dean Milk Company.

Exhibit 27, Permit #61 issued by Board of Public Health, State of Illinois, Grade A Label for milk and milk products, to Dean Milk Company.

170 These permits were issued to Dean Milk Company for plant at Huntley, Illinois, and plant at Chemung, Illinois. Exhibits received in evidence.

Dean Milk Company has two plants, one at Chemung, Illinois, and one at Huntley, Illinois.

The Dean Milk Company does not bottle any Grade B milk. We use only Grade A milk, and that is the only product handled in these products in our pasteurization plant.

The Grade B milk is sold as dry dairy product or evaporated milk.

No Grade B milk is sold as pasteurized fresh milk.

171 The following exhibits were marked for identification.

Rec. Page

Exhibit 28, Certificate of Approval to Operate a Milk Plant, by the Department of Agriculture of Illinois to Dean Milk Company.

Exhibit 29, Certificate of Approval by the Department of Public Health of Illinois to Dean Milk Company.

Exhibit 28 was a certificate for the year 1948, and Exhibit 29 is for the year 1949.

Received in evidence.

178 The purpose of requiring the milk to be cooled to 60 degrees or under is to keep the bacteria count down. There is another method set forth in the Madison ordinance whereby it can be determined that the bacteria count is kept down within the limits prescribed by the Madison ordinance other than cooling to 60 degrees.

179 Q. Will you read that part of the Madison ordinance?

The Chicago ordinance has the same provision.

In plain English it means that the bacteria count before pasteurization cannot exceed 200,000 per c.c.

Both ordinances are similar.

Assuming that milk under the Chicago ordinance is cooled to 65 degrees, instead of 60 degrees, it still has to meet the test of less than 200,000 bacteria per c.c. which is called the "clump" count.

180 The Chicago ordinance, for all scientific purposes, complies with the requirement of the Madison ordinance.

The covering on the milk referred to by Dr. Kin-

Rec. Page

caid refers to glass bottles. All of Dean's milk is sold in paper cartons.

(Marked for identification Exhibit 30, a folded milk carton).

(Exhibit 31, a folded milk carton).

Dean's Grade A milk is placed in these cartons; one is bottled in Chemung, Illinois, and one at the Huntley, Illinois, plant.

181 (Exhibits 30 and 31 received in evidence.)

These exhibits show the plant that the milk was pasteurized in and contains the permit number from the Chicago Board of Health so that the Madison officials would have no difficulty in determining which milk plant the milk came from.

The Dean Milk Company obtains its milk from approximately 950 farms in Northern Illinois and Southern Wisconsin. Each farm has a permit from the Chicago Board of Health. Copies of these permits are on file at the pasteurization plants of the Dean Milk Company and have to be on file before the milk can be received.

182 Q. State briefly after the milk comes to the pasteurization plant what happens to it? A. Each can is opened and examined for odor. It is then dumped and regularly a sample is taken about twice a month for sediment test, weekly for bacteria counts and the bacteria tests which are run are the methylene blue test and direct microscopic count is run at least monthly and the laboratory pasteurized count

Rec.
Page

on each sample of each producer's milk is run monthly.

Q. Are you in charge of these tests you speak of?

A. Yes.

Q. Tell us what these tests are? A. The sediment test is a test where a pint of milk is taken off the bottom of a ten gallon milk can or eight gallon milk can and that pint of milk is forced through a small cotton pad. It is for the purpose of determining whether the milk is free from dirt or filth.

The bacteria counts are run to determine the compliance of the farms as to the methods of producing. In other words, if the milk comes from cows with diseased udders, it will show up as a high bacteria count. If unclean equipment is used on the farm, it will show up as high bacteria count milk, or if poor cooling is practiced upon the farm, it will show up as high count milk.

Q. Dr. Corbett, Does the Dean Milk Company have farm inspectors of their own? A. Yes.

183 Dean Milk Company has farm inspectors which are under the supervision of Mr. Davis.

The tests which I have described are under my supervision. The method of pasteurization is slightly more stringent than that required by the Madison ordinance. The Madison ordinance is 140 degrees Fahrenheit for 30 minutes or 160 degrees Fahrenheit for 15 seconds. The Chicago Board of Health is 160 degrees for 15 seconds, or 144 degrees Fahrenheit for 30 minutes.

Sec.
Page

The average temperature of the milk when received at the plant is around 58 or 60 degrees.

I have examined the Madison milk ordinance of August 27, 1949, section by section.

184 I am acquainted with the sanitation of the farms where the Dean milk is produced, I am acquainted with the methods of pasteurization and with the delivery of the finished product. The Grade A pasteurized milk and milk products of the Dean Milk Company from a health standpoint comply with the Madison Milk Ordinance with a few minor differences but from a broad standpoint, they are essentially the same.

There were brought out some differences this morning in the testimony as to the cooling but the clump count takes care of that.

185 In regard to the differences of the wells on the farms, I have not seen the Wisconsin Code but the U. S. Public Health deals in detail with the construction of wells and their purpose is for healthfulness, and the wells on the farms in our producing area are constantly checked by the Chicago Board of Health inspectors so that they do comply with the U. S. Public Health Ordinance and code.

Cities other than Chicago inspect Dean plants and run spot checks on the farms. The City of Kenosha, Wisconsin, recently checked a large number of farms, something like 500; and the City of Kenosha issued a permit to Dean Milk Company on August 1, 1949.

The Wisconsin Department of Agriculture has recently made tests as to the purity and sanitation

Rec. Page

of Dean Milk from samples picked up at stores and from the delivering trucks.

186 The reports of those tests are kept by the Dean Milk Company in the regular course of business.

188 Exhibit 32 is a report to the Dean Milk Company from the Department of Agriculture of Wisconsin relating to the bacteria count and fat content of Grade A milk and Grade A half-and-half.

189 (Exhibit 32 received in evidence.)

The exhibit shows for Grade A homogenized Vitamin D milk a bacteria count of 6000; the Madison Ordinance allows 30,000. The report shows 3.5 butter fat and the Madison Ordinance requires 3%. The report shows that the Dean Milk exceeds the demands of the Madison Ordinance in both respects.

I have reports from Racine, Wisconsin, Elgin, Illinois, and several from the Chicago Board of Health.

190 These cities pick up the milk for testing purposes when it is delivered and the Health Commissioner of Madison could make the same test.

The Racine report shows bacteria count September 20, 1949, of 1000 which is 29,000 under the amount allowed by the Madison ordinance.

The next is Elgin, Illinois, September 21, 1949, butter fat 3.5%, bacteria 7000, which far exceeds the demands of the Madison ordinance.

191 We could multiply those by thousands from all over the country. I am acquainted with the Public Health Service with respect to the rating of milk sheds. They do not issue certificates. The informa-

Rec. Page

tion is available by writing to them or verbally asking them.

I received Exhibit 3 from the U. S. Public Health Service September 23, 1949, in the due course of mail. It is signed by Harold Wainess, the sanitarian. I am acquainted with him and know that he holds
192 that job. I recognize his signature. Exhibit 3 which shows the rating of the Public Health Service of the Dean Milk Company operating under permit from the Chicago Board of Health made co-operatively with the Public Health Service and the Illinois State Department of Public Health shows that the raw milk sold to the plants was 91.05% and the rating of the pasteurization plant of 93.42% offered and received in evidence.

Cross Examination Made by Mr. Hanson.

I have worked for the Dean Milk Company since July, 1943.

193 The bottle milk sold by the Dean Milk Company is produced under the standards of the Chicago Milk Ordinance. The company has a pasteurization plant in Huntley, Illinois, and one at Chemung, Illinois. It operates other receiving stations.

Grade B milk handled by the company is handled at its plants at Pecatonica, Illinois; Pearl City, Illinois; and Rockford, Illinois.

194 Chemung, Illinois, is about 65 miles southeast of here and Huntley is about 20 miles further on. They are near Elgin, Illinois. The farms that furnish these plants with milk are located in an area about 20 to 25 miles around the plants.

Rec. Page

I cannot answer your question whether it is economically efficient for farmers to deliver milk to milk plants from a greater distance.

195 Chicago gets milk from 50 to 60 miles in some cases where it is a direct haul. It varies with the market. I don't know whether the Chicago Milk Ordinance permits reciprocal inspection. The farms that furnish milk to Dean Milk Company are all inspected by Chicago Board of Health.

It is my position that milk that contains less than 30,000 bacteria per c.c., meets the other requirements, and is properly pasteurized, would be safe for delivery in Madison.

196 A single bacteria count would not be a sufficient test to satisfy health standards of the Madison ordinance. The inspection of the barns and of the cattle are desirable but are not necessary from a pure health reason.

197 The Chicago ordinance requires inspection of barns and cattle and a sanitary condition under which the milk is produced. The Chicago authorities are not satisfied with the bacteria count. Both the Chicago ordinance and the U. S. Public Health ordinance go into minute detail as to provisions and conditions under which milk is produced on the farm; they go into much detail as to construction of the barn, lighting equipment, construction of the milk house, cooling, and other matters.

The Chicago milk ordinance allows milk to be delivered without cooling if delivered to the plant within two hours after milking, but it still must meet the other requirements such as bacteria count, etc.

Rec.
Page

198 So far as I know, the Chicago Ordinance and the Illinois State law do not prohibit the standardization of milk. Standardization of milk is not done by the Dean Milk Company. The Dean Milk Company does not operate any farms directly. The Chicago Milk Ordinance requires inspection of the farms every 6 months but they are inspected every month.

199 Exhibit 32 shows the amount of bacteria in a pasteurized bottle of milk picked up in a store in Whitewater, Wisconsin. So far as I know the inspector picked up the bottle of milk but did not inspect the farm where it was produced. In our laboratories we used a standard plate count for total bacteria and for coliform; we use a phosphatase test for determining adequacy of pasteurization which is also outlined in the standard analysis of milk analysis. The inspectors of Chicago Board of Health use a similar test. They use methylene blue test for raw milk.
200 That is the only test Chicago inspectors use for individual farmers, and for bulk samples they use the standard plate count.

I have no more information about the spot checks made by the U. S. Public Health Service than what was given already in the testimony. A spot check is being made of the Chicago milk shed now. A spot check would indicate if there is anything wrong with the farm that was examined.

201 I don't know whether they include every plant in a spot check. They have always included our plants in each survey.

I believe that rigid inspection and rigid standards

Rec. Page

are necessary to insure healthful milk in a community. Passing an ordinance does not insure safe, clean milk. The ordinance must be enforced!

202 It would not be possible for the Chemung plant to use containers marked "Huntley plant" because the Labeling Act of Illinois requires the name of the plant to be on each container. If we used the bottles marked "Huntley plant" at the Chemung plant, that would be a variation of the law and the milk would be subject to seizure and condemnation.

About 200 farms supply the Chemung plant direct, indirect 950. The milk received direct is mixed with milk received indirect. About 125 supply milk direct to the Huntley plant and 950 indirect.

We market milk in Wisconsin which is produced in both plants.

(Witness examining paper) This is the first time I have seen the resolution of the Chicago Board of Health, September 28, 1942, which provides, "Whenever any person or firm refuses to make available to the City of Chicago all of the milk of such person or firm, when needed, the inspection given to the firms and plants of such person or firms shall be withdrawn."

Redirect Examination by Mr. Geffs.

Dean Milk Company has no objection to the City of Madison inspecting all of these farms, delivery trucks, pasteurization plants, and have no objection to anyone inspecting and our records are available and open to any municipality of the state.

Rec. Page

204 The 950 farms that I mentioned that furnish milk indirectly, furnish to both Huntley and Chemung plants. The figure 950 involves the same farms.

All the 950 farms are regularly inspected by the Chicago Board of Health and when I say supplying milk indirectly, that is milk which we receive through our receiving stations. At the receiving station like Darien, Wisconsin, the milk is cooled and transported by tank trucks to Huntley or Chemung. It is all inspected milk.

I testified in cross-examination that rigid inspection was necessary and in my opinion as an expert, Section 11 of the U. S. Model Milk Ordinance providing for reciprocal inspection provides a safe plan from a health standpoint.

205 The spot check that Mr. Hanson was asking me about is a recognized method of inspection employed by a number of cities.

206 In my opinion as an expert, the 5-mile limitation on pasteurization plants in the Madison milk ordinance is not a health measure.

In my opinion as an expert, the 25-mile limitation in the Madison Ordinance which provides that the health officer shall not be obligated to go beyond 25 miles in inspecting farms, is not a necessary health measure.

207 H. J. BURGER, called as witness on behalf of the plaintiff, testified as follows:

My name is Herbert Burger; I live at Janesville, Wisconsin; I am and have been for the last eight

Rec. Page

years the sanitary inspector of the Health Depart-
208 ment. My duties are inspection for the city of food, hotels, restaurants, nuisances, and milk; I inspect dairy farms within the locality of Janesville that supply milk to Janesville; I inspect pasteurization plants.

Exhibit 33 is certified copy of the Janesville Milk Ordinance adopted June 29th, 1946; Janesville adopted the U. S. Model Milk Ordinance with the exception that they gave dairies already in business two years in which to reach Grade A milk.

Exhibit 33 received in evidence.

All milk sold today in Janesville is Grade A pasteurized milk.

209 I am acquainted with Sec. 11 of the U. S. Model Milk Ordinance providing for reciprocal milk inspection.

210 In my opinion, Sec. 11 of the U. S. Model Milk Ordinance providing for reciprocal inspection is a sound health measure for the city receiving milk from another community.

In my opinion, the provision of the city ordinance providing that all milk sold in the city must be pasteurized within five miles is not a necessary health
211 measure. The Dean Milk Company sells Grade A pasteurized milk and milk products in the City of Janesville, and has been doing so for the past three years. I have inspected the Dean Milk Company plant at Chemung, Illinois.

Q. What did you find on your inspection?

Rec. Page

Mr. Hanson: I object to it as immaterial.

The Court: We are back to the old question, Mr. Geffs. Are we trying the Dean Milk Company or trying the city ordinance; this Court would like to assume the Dean Milk Company is a very re-
212 spectable organization, and its milk is 3.5, a little above the average, but how will this be attacking the city ordinance? That is the question.

Mr. Geffs: If we could stipulate what you would like to assume, we could save a lot of time. I offered to stipulate, and Mr. Hanson said it was not material. I will stipulate. It is material, but if he will stipulate, we will save time.

The Janesville ordinance provides that the milk shall be cooled to 60 degrees after it is produced at the farm. Before Janesville adopted the new ordinance, outside milk could not be brought in. Under the old ordinance, we were never able to obtain Grade A pasteurized milk in Janesville. We did obtain Grade
213 A milk under the new ordinance. The reason for that was Dean Milk coming in to Janesville marked Grade A practically compelled our dealers to do likewise, and become Grade A for competitive purposes.

Cross Examination by Mr. Hanson.

There are four pasteurization plants located in
214 Janesville supplying Janesville markets. One plant is just over the line; two of these plants have been in business fifty years, one for thirty, one for twenty and one for eight.

The fact these plants were located close at hand made for more efficient and convenient inspection.

Rec.
Page

Milk is delivered to these plants from a radius of about ten miles.

The Janesville ordinance makes no restriction as to the location of the farms.

I inspect the farms within the ten mile radius, being about 110 of them.

215 I am able to inspect these 110 farms conveniently, and if the number of farms were doubled, it would not take another man. I am occupied full time, but if another 100 farms were added, I would probably increase my day's work.

I make spot checks of the farms supplying milk to the Dean Milk Company. I have visited the Dean plant twice and made two spot checks of farms at different times since they started supplying milk to Janesville. My spot check consisted of examining twelve or fourteen farms, and took from ten in the morning until three in the afternoon.

216 On the second inspection I inspected 12 farms in 4 hours, first inspection 1947, second in 1948. I probably would not have time to inspect all of the farms supplying the Dean Milk Company. I have never asked nor been furnished a check of the farms of the Dean Milk Company made by the U. S. Public Health Service.

I do not know in what respects the Janesville Ordinance is different from the Chicago Milk Ordinance.

217 There are farms in the Janesville area producing milk for the Chicago milk market; the Chicago market has their own farms and their own inspectors.

I do not think that a mere bacteria count of milk

Rec.
Page

would be sufficient. We require from the Dean Milk a phosphatase test and a coliform test so as to make sure that the milk is properly pasteurized. I do not accept a mere bacteria count test but I may explain that when the bacteria test is made at the State laboratory they also run a phosphatase test and a coliform test plus a butter fat test.

218 I do not rely on these tests alone. I inspect the Janesville farms twice a year plus other inspection that is necessary.

Before I became sanitary inspector 8 years ago I ran a dairy plant.

Redirect Examination by Mr. Geffs.

219 From my inspection of the Dean plant, I believe that the Dean Company is meeting the requirements of the Janesville Ordinance.

I have an opinion about the Chicago inspection and my opinion is that it is adequate.

Recross Examination by Mr. Hanson.

I believe my inspection is good. I don't know whether Chicago would rely on my inspection.

Mr. Geffs: Plaintiff's Exhibit 12, here, page 79. (77) This is from the Chicago Ordinance. (Reading.) "Products Shipped From Beyond Limits. Milk and milk products from points beyond the limits of inspection of the City of Chicago may not be sold in the City of Chicago unless produced and pasteurized under provisions identical with those of this article and approved by the Board of Health. In order that

Rec.
Page

inspections by the Board of Health may be adequate, thorough, and effective, the Board of Health may confine its inspections within such points and territorial limits as the Board of Health may, from time to time, deem necessary to insure economic and proper supervision, and to safeguard and promote the public health of the City of Chicago."

So beyond the Chicago inspection, beyond where the Chicago men inspect, they do have a provision for reciprocal inspection. There it is.

221 DR. FRED B. WELCH, called as witness for the plaintiff, testified as follows:

My name is Dr. Fred B. Welch. I am Health Commissioner of Janesville, Wisconsin, and have been such since 1919. I am a M.D. I have supervision of Mr. Burger and the inspection of milk. I am acquainted with this milk problem.

222 I have an opinion on whether or not a limitation of 5 miles on pasteurization plants is a necessary health measure in southern Wisconsin. I don't think such a limitation has any value at all in the protection of public health of the city as far as the milk supply is concerned.

In my opinion it is not necessary that any city in southern Wisconsin have a 25-mile limitation in which the city refuses to accept milk produced on farms located more than 25 miles from the heart of the city. That is not a health measure.

Rec.
Page

Cross Examination by Mr. Hanson.

224 The pasteurization plants which supply Janesville outside of the Dean Milk Company are three located in Janesville and one just outside of the city limits. They supply Janesville under our Grade A milk ordinance.

I think Janesville at one time had a provision which required pasteurization plants to be within a certain distance from Janesville and that ordinance was in effect until we adopted the U. S. Grade A Public Health Milk Ordinance. We adopted the U. S. Grade A Public Health Ordinance about 3 years ago.

225 From 1919 to 1946 the Janesville Ordinance required pasteurization plants to be located in the City of Janesville but you must remember a Health Department is not the legislative board of the city and that the Health Department must be governed by the legislation under which it is controlled and under which it has to work. The efforts I made to have the ordinance modified commenced in 1923 when the work of milk inspection was added to the department. We tried in every way to modify our regulation so that we could broaden the scope of our milk ordinance. The fact is, we have been working towards a U. S. Public Health Grade A milk regulation for many years.

We adopted the U. S. Public Health Milk Ordinance and gave the local distributors 2 years in which to comply with it.

I am fairly familiar with the Chicago Milk Ordinance.

Rec.
Page

226 The Chicago Ordinance known as the Kelly Ordinance, may not provide for reciprocal inspection. There are minor details, insignificant variations between the Kelly regulation and the U. S. Public Health Ordinance that don't amount to much. You could accept either one of them and produce a good grade of milk.

I would say from my own observation that the Janesville Milk Ordinance complies in all respects with the recommended U. S. Public Health Milk Ordinance.

I would say that merely taking a bacteria count irregardless of whether it is sold under Grade A or not, would not be sufficient to guarantee a safe and sanitary milk supply to a city.

Q. In other words, it takes constant inspection and supervision under which the milk is produced?

A. You can tell by the methylene blue test and also by the phosphatase test on pasteurized milk and the coliform test and by microscopic test, visual test, pretty much as to the quality of the milk.

Q. In your opinion, are those sufficient?

227 A. That isn't only my opinion, it is the opinion of the Department of Agriculture and the best men in the field of public health work.

Q. Then it wouldn't be necessary to have all these provisions in the ordinance, the detailed requirements as to structural requirement, cleanliness of the barns and so forth? A. That is debatable.

Q. In your opinion that is debatable? A. That is debatable.

Rec.
Page

Q. Those might all be wiped out? A. I didn't say that. I said as to these requirements, it might be debatable.

Q. In other words, there is room for argument?

A. I have been in the health game so long I know sometimes what were thought were necessary things were again thought that weren't necessary. You see, as far as the location of the milk house to the barn and all those things which I don't think comes into this argument.

Q. And yet all those provisions are included in the U. S. Model Health Ordinance? A. Yes.

Q. You think they might be practically unnecessary? A. They are necessary if you take the country as a whole.

Q. But they are not necessary where you have the methylene blue test? A. It is necessary you have all those tests and all those requirements when you take the United States as a whole because I have been
228 in various sections of it and made inspections with milk inspectors and in various sections our conditions vary. We aren't all so fortunate as we are in southern Wisconsin and northern Illinois.

Q. You heard the testimony of Mr. Burger in reference to the number of spot checks he made of the farmers producing for the Dean Milk Company?

A. Yes.

Q. In your opinion as Health Commissioner are those spot checks he made sufficient? A. Well, I helped him make the first group and I would hate to criticise my own work.

Rec. Page

Q. We won't ask you to do that, Doctor. A. No, I couldn't.

Redirect Examination by Mr. Geffs.

I have an opinion as to the efficiency of the inspection of the Chicago Board of Health based not only for the present time but for the last many years,
229 and it is a very high opinion of their inspection work. I have been very close to their inspectors and I have had complete cooperation from them and gave them my entire cooperation. I cannot speak highly enough for the Chicago Health Department. That is my answer.

MR. JAMES H. DAVIS, called as a witness on behalf of plaintiff, testified as follows:

Direct Examination by Mr. Geffs.

My name is James H. Davis, live at Rockford, Illinois and am employed by the Dean Milk Company.
230 My position is Director of Farm Relations. I supervise the field force that we have out inspecting the farms and I have charge of the procurement program of an adequate supply of milk of high quality for our plants.

I have a B. S. degree from the College of Agriculture, University of Illinois, majored in dairy production and an M. A. degree from Northwestern University.

The Dean Milk Company has 7 inspectors under my supervision inspecting the farms all the time. I would say that each farm was inspected once a month.

Rec. Page

That inspection is in addition to the other inspection by cities and municipalities in which Dean milk is sold. I have read the Madison Milk Ordinance of August 27, 1949.

231 Dean Milk Company receives milk from about 950 farms. In my opinion these farms and their equipment comply with the present Madison Ordinance. The Model Milk Ordinance requires a tight top on the wells that supply water and the Chicago Ordinance and the State law of Illinois require that the water be pure and sanitary.

232 The Chicago Ordinance provides that the water must be sanitary and the Chicago Health Department inspect the facilities from which the water comes. The well tops have to be tight.

I have samples of forms which each individual farm must fill out and furnish.

(Exhibit 34—Form letter from Chicago Board of Health for permit to farm furnishing milk to the Dean Milk Company, is identified by the witness as a farm permit of a Grade A farm.)

There is a similar farm permit for each farm that ships milk to Dean Milk Company. The permit is issued by the Chicago Board of Health and a copy is furnished to the Dean Milk Company. The copy is
233 kept on file at the Dean Milk Company and is available to the Madison Health officer or anyone else that desires to inspect it.

(Exhibit 34 received in evidence)

(Exhibit 35—printed form of patron's quality record kept by Dean Milk Company)

Rec.
Page

This record is kept by the laboratory technician in each one of the Dean Milk plants. This record is kept for each and every farmer furnishing milk to Dean. It is available for inspection by any health officer.

234 This record shows the patron's methylene blue record for each week that it is taken. It contains a sediment test which shows the contents of the milk as it comes in in regard to the amount of sediment each week as it is taken. It also shows the temperature of the milk when it is taken in.

It shows resazurin which is another test for determining the quality of milk from the standpoint of sanitation.

It shows the microscopic or clump count as you were calling them. "Pasteurizability" on this report means the condition of the milk after it is pasteurized, the number of bacteria that are left.

These tests are made by the Dean Milk Company on each farmer producing and sending milk and are made on alternate weeks several times a month.

235 These records are kept and may be inspected by any health officer.

(Exhibit 35 received in evidence)

(Exhibit 36—a mimeograph form of the Dean Milk Co. being a score sheet of farm milk furnished to plant, identified by the witness.)

This exhibit is kept by each receiving station for each patron furnishing milk to Dean Milk Company.

Milk is received at the receiving stations and transported to the two pasteurization plants.

Rec. Page

236 These records contain information similar to the previous exhibit we went through and they are available and on file for any health commissioner that desires to see them.

(Exhibit 36 received in evidence).

(Exhibits 37 and 38 marked for identification being a penny postcard with mimeographed information.)

Exhibit 37 is a card that is mailed to each patron every time we run a microscopic count or "breed" count stating just where he stands.

Each farm producer receives one of them from the Dean Milk Co.

237 Exhibit 38 is a similar card that is mailed to each patron when we run a methylene blue test to show him the results.

(Exhibits 37 and 38 received in evidence).

(Exhibit 39—a printed form entitled "Dairy Farm Inspection Report" marked for identification).

Exhibit 39 is a dairy farm inspection report made by our field men and kept on file at the Dean plant. One copy is usually left with the farmer and another copy filed with the plant. These records are available to any health officer who wants to inspect them. These records take up the health of the cows and follow the health code.

(Exhibit 39 received in evidence).

238 The spot surveys conducted by the U. S. Public

Rec. Page

Health Service are not made for the purpose of checking on individual farms but for the purpose of checking on the efficiency of the inspection of some municipalities. The spot survey rates the degree of efficiency of the inspection. All farms furnishing milk to Dean are inspected by the inspectors of the Chicago Board of Health and also by Dean's own inspectors.

Cross Examination by Mr. Hanson.

239 If Madison had adopted the U. S. Model Milk Ordinance it would communicate with the U. S. Public Health Service to determine whether Chicago was making good milk inspection.

240 I have examined the Madison Ordinance and the farms that produce milk for Dean substantially comply with the standards set forth in that Ordinance.

241 There are some differences pointed out this morning.

The Dean Milk Company runs the methylene blue test on milk received. The microscopic and methylene blue tests are used to determine the number of bacteria in a sample of milk.

242 Dean Laboratory is set up to use both the microscopic and the methylene blue test. A routine is set

243 up. These tests are made and records kept for the purpose of seeing that the milk complies with the standards of the Chicago Milk Ordinance.

Redirect Examination by Mr. Geffs.

244 In my opinion as an expert there is no material difference as to requirements for sanitation of the milk house by a drain trap in the Madison Ordinance

Rec. Page

and the Chicago Ordinance requiring the milk house and premises to be kept in a clean and sanitary manner.

245 DR. W. J. CORBETT, testified as follows:

Recross Examination by Mr. Hanson.

The Dean Milk Company uses both the microscopic test and the methylene blue test.

246 Each month each farmer's milk we run a direct microscopic test for each monthly period. Each monthly period we also run a laboratory pasteurized count. During each month we also run a minimum of one methylene blue test in the months from October to April and the months from April to October we run our methylene blue test each week in addition to the direct microscopic once a month and the laboratory pasteurized once a month, and sedimentation on each patron's milk twice a month.

Q. So these tests are concrete? You have three tests of the same farmer's milk each month? A. We have more than that. There would be a direct microscopic, at least one methylene blue, a laboratory pasteurized, and at least two sedimentations.

Q. I think I understand you now. And whether or not you are going to use the one or the other depends upon regular routine? A. That's right.

Q. Which is set up in advance? A. Yes.

Rec.
Page

247 ROBERT ALDER, called as witness on behalf of plaintiff, testified as follows:

Direct Examination by Mr. Geffs.

I live at Elkhorn, Wisconsin; I am a distributor of Dean Milk in Southern Wisconsin, and I have a bottling plant of my own. I came from Switzerland in 1920. I have a Bachelor's Degree in Dairying from the Federal Technical Institute of Switzerland. I have been engaged in the milk business ever since I have been in this country; my milk plant at Elkhorn, Wisconsin is inspected by the Wis. Dept. of Agriculture. The milk I distribute in Southern Wisconsin for the
248 Dean Milk Company I obtain from the Chemung, Illinois, plant. It is in cartons when I receive it and I put it in my truck, which is insulated and refrigerated, and the temperature in the truck is kept around 40. It is kept around that temperature until
249 it is delivered to the stores. In case Dean is admitted to Madison, I would be the distributor. I deliver Dean's Grade A pasteurized milk and milk products to the following cities and villages in Dane County, Wisconsin: Mazomanie, Black Earth, Marksville, Middleton, Belleville, Dayton, Brooklyn, Oregon, Stoughton, Albion, Utica, McFarland, Deerfield, Cottage Grove, Rockdale, Cambridge, Marshall and Verona.

I have been a distributor for Dean Milk 17 years, and as an expert in milk, it is my opinion that Dean Milk is pure, wholesome and sanitary, and that is true of their milk products.

Rec. Page

Cross Examination by Mr. Hanson.

I would not be distributing Dean products unless I believed that they were pure, wholesome and sanitary.

250 There is no pasteurization plant in Mazomanie, Black Earth, Marksville, Middleton, Belleville, Dayton, Brooklyn and Oregon. There is a pasteurization plant at Albion, and it distributes milk in Albion. There is no pasteurization plant in Utica. There is one at McFarland which distributes milk at McFarland. I don't know whether Deerfield has a pasteurization plant.

251 There is no pasteurization plant at Rockdale, and I could not say as to Cambridge, Marshall and Verona.

Redirect Examination by Mr. Geffs.

Dean milk and milk products which I distribute and sell are produced in the State of Illinois. I obtain them in the State of Illinois, bring them across the state line and sell them to stores here in Wisconsin.

252 PARK LIVINGSTON, called as witness in behalf of plaintiff, testified as follows:

Direct Examination by Mr. Geffs.

I am Vice-President of Dean Milk Company, and have held that office for seven years; I am a member of the Illinois Bar; Dean Milk Company obtains its milk from about 900 farms in Northern Illinois and Southern Wisconsin; Dean Milk Company does not own these farms, but its business is dependent upon getting milk from these farms.

Rec. Page

253 Q. Now, Mr. Livingston, there is some question raised here about the water supply. Will you take this plaintiff's Exhibit 12 and explain to the Court here about this water supply on these farms?

A. Well, I may direct the attention of the Court to—this is our Exhibit 12, it it?

Q. Exhibit 12, that's right. A. On page 54 reading): "Item 7p.—Water Supply. The water supply shall be easily accessible, adequate, and of a safe, sanitary quality." Do you want the public health explanation for that?

Q. Yes, explain that. A. And it so further states: "Public Health Reason. The water supply should be accessible so as to encourage its use in cleaning operations, it should be adequate so that cleaning and rinsing will be thorough, and it should be of safe, sanitary quality in order to avoid the infection of milk equipment and contatiners."

Then the thing goes on and it explains satisfactory compliance. "This item shall be deemed to have been satisfied if: (1) All milk-handling rooms of the pasteurizing plant are provided with an adequate number of water outlets, and (2) The water supply is ample in quantity to insure proper cleaning of the plant and its equipment and (3) The water supply is approved as safe by the Board of Health and conforms with the specifications contained under Item 11r, Water Supply, Grade A Pasteurized Milk, Satisfactory compliance, paragraph (4)."

254 And referring to Item 11r, water supply, I will continue to read from our exhibit. (Reading.)

Rec. Page

"The water supply for the milk room and dairy barn shall be properly located, constructed, and operated and shall be easily accessible, adequate, and of a safe sanitary quality."

The public health reason: (Reading.) "A dairy farm water supply should be accessible so as to encourage its use in cleansing and cooling operations; it should be adequate so that cleansing and rinsing will be thorough; and it should be of safe, sanitary quality in order to avoid the infection of milk utensils.

"A slightly polluted water supply used in the rinsing of dairy utensils and containers may be far more dangerous than a similar water supply used for drinking purposes only. Bacteria grow much faster in milk than in water, and the severity of an attack of a given disease depends largely upon the size of the dose of disease germs taken into the system. Therefore, a small number of disease organisms consumed in a glass of water from a slightly polluted well may possibly result in no harm, but if left in a milk vessel which has been rinsed with the water only, after several hours growth in the milk, result in a case of disease.

"Satisfactory Compliance: This item shall be deemed to have been satisfied

"(1) When the water supply is easily accessible to the milk house and the dairy barn.

255 "(2) When the water supply is, in the judgment of the inspector, adequate in quantity to promote cleanliness and proper cooling.

"(3) When no service or cistern water supply is

Rec.
Page

used except under conditions approved by the Board of Health.

"(4) When the source of water supply is a public water supply approved by the Board of Health, or a spring, dug well, driven well, bored well, or drilled well which complies with the following specifications: provided, that items (e), (f) and (j) shall be required only for water-supply structures which are installed subsequent to the first inspection based upon these requirements:

"At least one inspection shall be made each inspection period to determine whether the location, construction, and operation of the supply comply with the specifications which follow. Bacteriological results on samples of water shall comply with the U. S. Treasury Standards for drinking water."

Q. Well, that ought to be about enough on water. In other words, the ordinances and regulations provide that this water shall comply with the U. S. Standards for drinking water? A. That is correct.

Q. And the water is inspected according to the regulation, the regulation provides for inspection of water on these farms? A. That is correct.

256 Q. Now, Mr. Livingston, are you acquainted with the spot surveys made by the United States Public Health Service? A. I think so.

Q. Will you tell the Court what those surveys are and what their purpose is, what the functions of those surveys are? A. Well, the United States Public Health Service function in various areas. Now, in particular in regard to milk they have a model ordinance and a model code and it is a standard that can

Rec. Page

be used throughout the country or territorial possessions of the United States, well, let's say almost on a blueprint how a given community, incorporated or unincorporated, can follow specifications to insure a safe and properly handled supply of milk and milk products and of course in order to have a model ordinance and to have enforcement, there must be a group of men in the field that conduct this work. And the United States is divided into regions, it is directed under Washington, a man by the name of Fukes is in charge. These regions answer to him and he, in turn, is under the Surgeon General of the United States Public Health, and they go out on a shift at regular intervals and make these checks and issue ratings of the things that they find.

That is very brief, but I think that may answer your question.

Q. The ratings are upon the efficiency of the inspection of the producing area? A. I might amplify that. These checks, these ratings cover the cow in the country, and they run from there through the various
237 producing, distribution, transportation, and what have you, phases or steps, to the consumer in the city. Some of these checks are picked up in the stores, in the ice box of the stores.

Q. And if the check shows the rating of 90 per cent or better, then that is called a satisfactory rating by the United States Public Health Service?

A. I think they would use adjectives. I think they would say it is very satisfactory.

Q. Now, is that information available to any health commissioner in any city in the United States?

Rec.
Page

A. Yes, it is. The United States Public Health Service, upon request, are happy to furnish such information.

Q. So the health commissioner of Madison, Wisconsin, could obtain that information for the price of a three cent postage stamp, is that correct? A. That is correct.

Q. He writes and asks him and they will give him all the information they have? A. That is correct.

Cross Examination by Mr. Hanson.

258 U. S. Public Health Service offers to the communities an ordinance and code. Once the community has adopted the code, they must have inspection to be sure the code is complied with. I did not imply and did not say that it was recommended by the U. S. Public Health Service that a community should not have inspectors of their own, and should rely on inspectors of the Federal Government. I said that they may do that, and it has been done. The U. S. Public Health Department maintains a staff of inspectors.
259 I could not tell you how many inspectors the U. S. Health Department has, and I do not know the method under which spot checks are conducted. I would not say that a spot check would have to include the pasteurization plant of the Dean Milk Company. The spot check, however, would have to conform to the Model Code, otherwise a favorable rating would not be issued.

260 Q. There is reciprocity, depending upon whether or not the city wants reciprocity? A. No, under the United States Public Health they provide for recipro-

Rec. Page

city. The City of Dubuque is in another region and by advice in official channels from the Chicago Regional Office to the Kansas City Regional Office, which includes Iowa, why, a reciprocal inspection was adopted, and that was just a recent instance which you could verify by contacting Colonel Merriwhether or his first assistant, Mr. Harold Wainess.

Q. I am getting at whether or not the city wants to rely upon it. There is nothing enforced by the U. S. Department, any U. S. agency, is there?

A. If you are thinking strictly of public health, yes.

Q. That it is enforced? A. No, they may rely on reciprocity.

Q. But doesn't the U. S. Health Department itself recommend that each individual community satisfy itself rather than relying solely upon this reciprocal inspection as to the source of their milk supply?

A. I don't think it goes that far. It is a model ordinance. It is a recommendation. They suggest conformity because there will be in that community a safe, reliable source of supply.

Now, it is, as I say, and I emphasize again, advisory in nature only and if a community wants to exceed
261 it, they may, but if they meet it then they say they conform under U. S. Public Health specifications. There is nothing compulsory about it.

Q. There is not only nothing compulsory about it, but isn't it true that the United States Department of Health specifically recommends that in case the reciprocal inspection provision is inserted in the ordinance, that the local health commissioner, or what-

Rec. Page

ever his title may be, not rely entirely on that inspection? A. No, I don't think that is stating a fact. I don't recall I ever read that. It may or may not be, but it is a right that a community, if it wants to go in, may exercise. (Examining paper.) Have I answered your question? I think what I said is contained in this order I have read, in the reciprocity clause in the ordinance. They are all very similar.

Q. Well, I show you Exhibit 1, Public Health Bulletin No. 220, Milk Ordinance and Code Recommended by the United States Public Health Service, Section 11, which is the reciprocal inspection provision. I will ask you whether or not immediately following that suggested section 11 occurs the following: (Reading.) "This section is intended to permit the health officer to bar milk and milk products shipped in from great distances unless he can assure himself that they meet the provisions of the ordinance.
262 Under no conditions should the health officer authorize the receipt of such shipments if arrangements cannot be made for supervision, unless an emergency exists, in which case permission should be given for its receipt, provided it is labeled 'ungraded milk' when distributed." A. Now, what is your point?

Q. Whether or not the United States Department of Health in recommending a model ordinance recommends that the local health authorities do not rely on reciprocal inspection alone but they have their own staff of inspectors and satisfy themselves?

A. Let's be specific. Here is the reciprocity provision of the City of Chicago following that suggestion which I have pointed out as a —

Rec. Page

Q. I am talking about the United States Health Code, not the City of Chicago. A. If you want to apply it to a given community, let's say you applied—

Q. I am asking what the recommendation is?

A. It is talking about ungraded milk and supervision. I was going to answer specifically not what I think but what I know, which is a matter of evidence introduced, Exhibit 12.

263 A. If I understand the gentleman he would like to have this construed as giving a city not only the right to look, but a right to bar.

Mr. Hanson: Q. Don't you think they have a right to look?

Mr. Geffs: Well, read the rest of it, Mr. Livingston, they suggest. Read it out loud and have it all in front of us. A. (Reading.) "It is suggested that the health officer approve milk or milk products from distant points without his inspection if they are produced and processed under regulations equivalent to those of this ordinance, and if the milk or milk products have been awarded by the State control agency a rating of 90 per cent or more on the basis of the Public Health Service rating method." That is why I was going to refer to the Chicago Ordinance where they apply that. The Chicago Ordinance provides for reciprocal inspection, and the Chicago Board of Health permits milk to be delivered in Chicago that has not been inspected by its own inspectors.

264 The Chicago Ordinance provides:

"Milk and milk products from points beyond the limits of inspection of the city of Chicago may not be sold in the City of Chicago unless produced

Rec.
Page

and pasteurized under provisions identical with those of this article and approved by the Board of Health."

The Chicago Board of Health did rely upon the inspectors of the U. S. Board of Health, and in fact, they are now jointly engaged in making a survey today, and if it had not been for that fact, they would have been here today.

265 For Chicago to honor reciprocity did not violate their ordinance; the Chicago inspectors take great pride in telling you that the Chicago city ordinance is a model U. S. Public Health ordinance and code.

All Dean Milk is inspected by the inspectors of the U. S. Public Health Service.

266 *Redirect Examination by Mr. Geffs.*

Sec. 11 of the revised U. S. milk ordinance recommended by the U. S. Public Health Service:

"Section 11. Milk and Milk Products from Points Beyond the Limits of Routine Inspection. Milk and milk products from points beyond the limits of routine inspection of the municipality of Blank may not be sold in the municipality of Blank, or its police jurisdiction, unless produced and/or pasteurized under provisions which are substantially equivalent to the requirements of this ordinance and which are enforced with equal effectiveness as determined by a milk sanitation rating."

It is the plan of the U. S. Model Milk Ordinance that each community inspect the farms located in their vicinity. When milk is proposed to be brought
267 into some community beyond their regular routine

Rec. Page

inspection, then it may be brought in if the producing area has a similar ordinance and inspects the farms, and the health officer in the receiving area is satisfied that the ordinance of the producing area is being enforced, and he may satisfy himself by two methods: (1) going down there and inspecting himself, or (2) he may write to the U. S. Public Health Service, and the Public Health Service will tell him what its survey has shown as to the efficiency of that inspection. It saves communities money to be able to rely on reciprocal inspection.

If Madison was permitted to allow milk produced around Janesville to come into Madison, the Madison health officer could satisfy himself that Janesville has an ordinance substantially the same as Madison, and that Janesville was actually making the inspections. The U. S. Public Health Service does not take the place of the Madison inspectors around Madison, or the Chicago inspectors in the Chicago milk sheds, or the Janesville inspectors around Janesville.

The U. S. Public Health Service goes around and rates those inspections as to their efficiency, and determines whether or not they are actually complying with the Model Milk Ordinance.

268 That information is given to anyone who asks for it free of charge.

Recross Examination by Mr. Hanson.

The Model Milk Ordinance provides that the health officer of the receiving community can satisfy himself that the ordinance of the producing area is being

Rec. Page

enforced effectively by the milk sanitation rating issued by the U. S. Public Health Service.

269 The Madison health officer can satisfy himself of the effectiveness of the Chicago inspection and can find a rating on the Chemung and Huntley areas by contacting the Chicago Board of Health or the U. S. Public Health Service.

270 The health officer in Madison could satisfy himself that the ordinance in the producing area was being enforced by mail.

Redirect Examination by Mr. Geffs.

271 In answer to Mr. Hanson's inquiry, the suggestion of the U. S. Public Health Service under Sec. 11 in plaintiff's Exhibit 1 reads:

"This section is intended to permit the health officer to bar milk and milk products shipped in from great distances unless he can assure himself that they meet the provisions of the ordinance. Under no conditions should the health officer authorize the receipt of such shipments if arrangements can be made for supervision, unless an emergency exists, in which case permission should be given for its receipt, provided it is labeled 'ungraded milk' when distributed.

"It is suggested that the health officer approve milk or milk products from distant points without his inspection if they are produced and processed under regulations equivalent to those of this ordinance, and if the milk or milk products have been awarded by the State control agency a rating of 90 per cent or more on the basis of the Public Health Service rating method." And for 29 there, a footnote that says, 'See Methods of

Rec. Page

Making Sanitation Ratings of Milk Sheds, Reprint Number 1970 from the Public Health Reports of August 12, 1938, page 1386.' "

Q. You are reading from page 145 of Exhibit 1, are you?

A. Yes, sir.

Recross Examination by Mr. Hanson.

272 The health officer could satisfy himself that milk was being produced under equivalent regulations by writing to the Clerk of the Chicago Board of Health, or he could have the corporation counsel do it for him.

273 Sec. 11 does not preclude the health officer from using his own head in securing the information that is available.

Recross Examination by Mr. Geffs.

24 There is no reason why the health officer of Madison could not follow the example of the Janesville health officer, and go down to Chemung and look around himself, inspect some of the farms, and determine whether or not it was being adequately inspected. The records are all available.

The health officer of Madison could write the U.S. Public Health Service; he could write the Chicago Board of Health; he could go down and make a spot survey himself, and examine the plant and the records. All those methods are available.

Recross Examination by Mr. Hanson.

The above methods in determining whether an

Rec. Page

adequate inspection is being made are not precluded by the Model Milk Ordinance.

275 . Plaintiff rests.

276 Exhibit 40. A report of Wisconsin Livestock Reporter received in evidence.

277 Exhibit 41, a booklet entitled "Dane County Agriculture, County Agricultural Statistics Service, Wisconsin"—received in evidence.

Mr. Hanson: I would like to introduce Exhibit 41 and call attention to the data contained therein as follows: On page 1, statistics showing that the land area in Dane County is 765,025.39 acres.

The matter contained on page 17 in the column at the head of the page showing that in 1945 Dane County had 5,678 farms.

The data contained on pages 56 and 57 showing the dairy products manufactured in Dane County in 1945 in thousands of pounds—showing that the butter
278 manufactured was 4,447,000 pounds; total cheese, all kinds, 12,683,000 pounds, evaporated and condensed milk, 55,497,000; powdered skim milk, 7,142,000; ice cream, 444,000 pounds.

HARVEY THEW, called as a witness on behalf of the defendants, testified as follows:

Direct Examination by Mr. Hanson.

I live in Madison. I am manager of the Madison Milk Producers Association, which is an association of farmers whose chief objective is to supply the city of Madison with fluid milk. I have held that position since 1926.

Rec. Page

279 Before I became manager I did cow testing association work, official state dairy record testing and some farming.

My education is grade school, short in agriculture at the University and night school.

The association functions in representing the producers. It bargains with local distributors for price and it also checks weights and tests to assure the farmers that the milk that they deliver is paid for according to what they deliver. Also it has employees who devote their time, all or in part, to field work, working on quality control and assisting dairy companies and the local health department in maintaining quality.

The field workers make some inspections and assist the city representatives in farm quality control.

280 The association acts in a broad sense as agent of producers in marketing to local dairies. It has a surplus plant which processes Swiss cheese. It has a little better than 350 members.

The Health Department reports 500 farms delivering milk to the Madison market; I am not sure 80 to 100 of them deliver to the University.

281 The University pasteurize and distribute fluid milk to dormitories and the State Hospital.

60 percent of the farms are within 10 miles of Madison, none farther than 20 miles.

Since 1926 Madison has received its milk from the same locality. 25 mile radius would include Dane County except the northwest corner.

282 There is roughly 4,000,000 pounds of fluid milk and cream consumed in Madison a month exclusive of the University.

Rec. Page

The larger dairies delivering in Madison are the Kennedy Dairy and the Borden Company; the Bow-
283 man Company; and the Bancroft Dairy. These companies have adequate facilities to furnish Madison with milk.

There is a tremendous amount of milk shipped out of Dane County, going into other localities, primarily Chicago; my estimate is that there is 10 times as much milk available in Dane County as is consumed in Dane County.

284 Some goes to condensaries and creameries and a tremendous amount is shipped to Chicago for fluid milk distribution.

285 My information is that Chicago inspectors inspect in Dane County.

Q. Now, you are familiar with the provisions of the Madison Milk Ordinance which provides that pasteurization plants be located within five miles from the Capital Square. A. Yes, I am.

Q. In your opinion does such a—is such a provision necessary to insure the continued quality and cleanliness of Madison milk? A. Well, I think a person can use common sense in answering a question of that sort regardless of what qualifications he has as a specialist. I personally believe that supervision that is close at hand is more dependable and economical and can be more consistent that supervision at a distance.

286 Close deliveries from farms to pasteurization plants are more satisfactory than deliveries from long distances. Supervision at a distance could not be too satisfactory unless one were to place abso-

Rec. Page

lute confidence in the people operating a long ways off.

287 Assuming that inspectors had to go to these farms (125 miles away) it is natural to do less when you go farther and it would cost considerably more.

The pasteurization plants located in Madison have their field men who cooperate with the city board of health field men in supervising the operation of these farms.

Besides making the surplus milk in Dane County into cheese we ship it to other markets.

288 The amount of surplus milk that goes into cheese varies, but I would say we have gone well over a million pounds of cheese in a year at different times. Farmers who failed to comply with Madison requirements have been expelled. Some have gone to Chicago markets, some into manufacturing markets.

289 *Cross Examination by Mr. Geffs.*

My interest in this controversy today is not entirely economic. That is one factor.

My testimony was that milk produced around Madison and sold in Madison met with the requirements of the Madison Ordinance to the satisfaction of the Board of Health until the new ordinance was adopted August 27, 1949. The new ordinance provides for Grade A pasteurized milk and Grade A pasteurized milk labeled as such is not being sold in Madison today.

290 I heard Dr. Kincaid say there were 6 dairies in Madison; there are 5 large ones. I did not include the University in my count.

Rec. Page

Grade A milk labeled as such is not sold in Madison today. The present Madison Ordinance requires that milk be labeled.

292 My contention is that the health department has not had sufficient time to approve of all conditions of the Madison market for Grade A.

I have been in the milk business around here since 1926 and Grade A milk labeled as such has never been sold in Madison except for a few years, a number of years back when Wisconsin had a Grade A milk law.

293 I testified that a tremendous amount of milk from Dane County in comparison to what was consumed in Madison was shipped across the state line to Chicago.

294 My best information is that inspectors from Alabama, Texas and Florida have come up here and possibly made spot checks. Evidently they were satisfied because in some cases they receive the milk. In my opinion that is not a reasonable procedure. They accept it in emergencies and in emergencies only. That emergency business has been going on for years.

297 Q. But now let's get the answer to my question: In your opinion do you think Birmingham and those southern cities should pass an ordinance like Madison, here, having a five mile limit on pasteurization plants and 25 mile limit on location of the farms, in your opinion should they do that right now?

A. It might be a question of five miles, depending on the size of the city, but my answer would be yes, with that exception.

Rec. Page

Q. That they should do that right now? A. Yes.

298 EDWARD R. FRIDAY, called as a witness on behalf of the defendants, testified as follows:

I live in Madison, employed by the City Health Department as senior sanitarian.

299 My duties are inspection of farms and processing plants, granting permits for new farms, taking away permits from farms who do not comply with the city ordinance. I am assisted by Glenn Drake.

We handle all of the inspections for farms and 300 dairies. There are 500 farms and 5 dairies. There are University, Bowman, Bancroft, Borden and Rennebohm—all within 5 miles of the capital square. The University and Rennebohm do not distribute milk generally.

301 The relationship of the 5 mile limit is to naturally limit the distances we have to travel to inspect farms. The larger the area of inspectors the more difficult is close inspection. A greater distance from farm to plant means more delivery expense which is absorbed by the producer.

302 The 5 mile limitation makes inspection more convenient, efficient, and less expensive. It would take 3 more inspectors to inspect the 950 Dean farms. The city would have to furnish transportation otherwise the inspectors would have to live down there.

303 There would also be the question of providing for laboratory facilities.

I have been connected with Madison Health Department 5 years; I operated a milk plant for 20

Rec.
Page

years; short course in agriculture and dairy practice at the University of Michigan, and Health Service
304 training course operated by the United States Public Health Service at Topeka, Kansas. I think the 5 mile limitation is necessary to furnish the highest possible quality milk supply for a community. I would not be satisfied with Chicago inspection in my own mind in view of some of the farms that left our market.

305 One improvement of the Madison Ordinance is the requirement that the hauler return the empty cans to the producer and put them on the rack; another improvement is trap drain which will exclude flies and rodents; closed hallway to exclude draft carrying dust and odors.

306 I can't think of the other requirements brought out. The Wisconsin Well Code sets up definite standards. We believe immediate milk cooling important because milk contaminated with bacteria and not cooled immediately allows bacterial development to begin.

307 Future farms that did not meet practically 100 per cent compliance with the requirements of Well Code, trap drain, cooling milk to 60 degrees and provision for delivery of cans would not be granted a permit. Such compliance is required under the Madison Ordinance.

Raw milk at the plants is tested by the Health Department of Madison by the standard plate count and sediment test.

308 The plate count test is more accurate and gives more information than the methylene blue test. We

Rec. Page

switched to the plate count test about 6 months ago because we felt it was more accurate.

Standardization of milk is altering the butter fat content by adding cream, or skim milk or removing cream.

309 The purpose is to alter the butter fat content and is not permitted under Wisconsin law unless labeled. The only way you can determine whether a plant is standardizing is by continual inspection.

Cross Examination by Mr. Geffs.

I put in full time inspecting milk and Mr. Drake put in all his time except 1 day a week.

310 If the 950 Dean farms were located within 25 miles of Madison, we would have to have additional inspectors to inspect them.

No Grade A milk, labeled as such, is sold in Madison today. I heard Dr. Kincaid testify yesterday that only one dairy was qualified for Grade A.

311 These requirements which I testified were so highly important are not being enforced 100 per cent at the present time, Oct. 11, 1949. 50 per cent of the farms are not complying with the trap drain.

312 I don't know what the law or custom is in Illinois about the milk hauler returning the empty can to the rack.

I believe that the trap drain and returning cans to rack are important even though the bacteria count is kept down by other means. The Madison Ordi-

313 nance requires a plate count of 200,000. That means the count shall not exceed 200,000 when milk is delivered to the dairy. The Chicago Ordinance has the same requirement.

Rec. Page

314 If Chicago does it by slightly different methods then the requirements of the Madison Ordinance has been met.

The hallway between dairy barn and milk house is not a requirement in the Madison Ordinance but a recommendation.

315 It was not my testimony that it was necessary that each and every farm be inspected by the Madison Board of Health of milk sold in Madison and that the City of Madison could not trust the inspection of any other board or body or municipality. I believe under the ordinance requirement, that under Section
316 11 of the Standard Ordinance. (U. S. Model Milk Ordinance) where the department is required to satisfy itself, that they should look at the farms.

Q. Well, as I understand it, then, your answer to my question is yes, that you think it will not be safe for the health of the people of Madison for milk to be sold in Madison unless it is inspected, the farms and plants, by the Madison Health Department, and cannot be trusted to any other municipality or public body, is that correct?

A. Well, there is degrees of safety. It is my opinion that if the department is going to do its utmost to insure the best, safest milk supply, that they should make the inspections, and take whatever machinery which may have been set up to make other inspections, make use of it.

Q. You use the word highest. Let's use the word reasonable, to insure reasonable safety, and it is your opinion, then, under this Section 11 of the model milk code that the City of Madison would

Rec. Page

have to inspect each and every farm and milk plant just the same in order to have a reasonable safe milk sold in Madison, is that your opinion?

Mr. Hanson: He didn't say reasonable, he said safest.

Mr. Geffs: I asked a new question. He said highest and I said, let's use reasonable.

A. The word reasonable there is interpreted in so many ways by different people.

Mr. Geffs: Q. I am asking you for your interpretation, the interpretation you put on reasonable?

Mr. Hanson: He didn't use the word. You did.

Mr. Geffs: Well, I am asking the question.

Mr. Hanson: I object to it.

The Court: Let the witness answer as best he can. Read the question, please.

(Question read as follows:)

"Q. I am asking you for your interpretation, the interpretation you put on reasonable?"

Mr. Geffs: Q. Use your interpretation of reasonable in answering the question.

Mr. Hanson: Do you know what reasonable means as used by Mr. Geffs? A. No, I don't.

317 Mr. Geffs: Q. You just use your definition of reasonableness, not mine. Yours. Now, let me put the question again: Using your definition of reasonable, is it your opinion— A. If—

Q. —that milk—O. K., if you think you can answer it. A. If I am instructed by my department to promote the best possible milk supply and it wasn't possible for me to make inspections of a distant area, I would then have to resort and use the available equipment to insure the best possible milk supply.

Page
Rec.

Q. Well, you don't answer the question. You testified as an expert a while ago that this five mile limitation was necessary. I believe you qualified it to have the highest grade of milk, or something of that kind, you used the word highest, I think, but you testified as an expert and you thought this five mile limit was necessary. I will ask you the question not on your health department instructions. I am asking you as an expert for your opinion. Is it your opinion now that in order to have a reasonable safeguard for the health of the people of Madison of the milk that is sold in the City of Madison that the Madison Health Department has got to inspect each and every farm and milk plant and cannot entrust that to any other body or municipality?

Mr. Hanson: I object to it unless counsel defines what he means by reasonable.

Mr. Geffs: Let this man use his own idea of reasonable in answering.

318 Mr. Hanson: There is no evidence he has promulgated or used the term reasonable.

Mr. Geffs: He testified on direct examination as an expert. I am cross examining.

Mr. Hanson: Not an expert on definitions of words.

The Court: The objection is overruled.

A. I will have to answer that as I did before that in order to promote the greatest amount of public health in our milk supply I believe that our department should make inspections of all farms and all plants. I believe further that if we are unable to make inspections, as some cities are, we would then

Rec. Page

have to resort to a probably trustworthy organization, the United States Public Health Service, to make those inspections and verifications for us.

Mr. Geffs: Q. You say "trustworthy organizations." In your opinion, the United States Public Health Service is a trustworthy organization?

A. To the best of my experience, it is.

Q. Now, Mr. Friday, will you read out loud here Section 7.15, Certified Milk and Grade A Raw Milk for Pasteurization, 1, Definition, sub. (a)? Would you read sub. (a) out loud? A. (Reading.) "Certified milk is milk which conforms with the requirements of the American Association of Medical Milk Commissions in force at the time of production and is produced under the supervision of a medical milk commission and of the State Board of Health or of
319 the City Health Commissioner of Madison."

Q. Now, this certified milk is not pasteurized, is it? A. Yes.

Q. (Reading.) "Certified Milk and Grade A Raw Milk for Pasteurization." You say certified milk is— A. Certified and Grade A milk for pasteurization.

Q. Yes, certified milk. All right. That answers the question. That is all.

Redirect Examination by Mr. Hanson.

If milk met the bacterial test count of 200,000 I would still be concerned with the sanitation of the farm, health of the animals and health of the people

Rec.
Page

taking care of the milk. The milk might contain pathogenic bacteria and still be under the maximum count of 200,000.

320 That is why the Madison, Chicago, U. S. Model Milk Ordinance all contain details and requirements concerning the conditions under which milk is produced in addition to the bacterial count test.

If the 950 Dean Farms were located in Dane County, Madison would not be able to consume all the milk from them.

321 DR. LOUIS FAUERBACK, called as a witness on behalf of the defendants, testified as follows:

I am a physician, graduated from N. Y. University in 1920 and practiced medicine in Madison since 1921. I have been Assistant Health Commissioner since 1923.

322 I am familiar with the present and prior Madison Ordinances. The purpose of the 5 miles limitation, contained in both of them was convenience and efficiency of inspection and controlling standards. An
323 additional purpose of keeping pasteurization plants near was to keep farms within a 25 mile radius. That is important to the people of Madison.

324 The Health Department has 2 inspectors, one paid a little over $300 a month and the other under $280 a month; the Department also maintains a laboratory for testing milk. If the 950 Dean farms were within 25 mile radius it would require 2 more inspectors to inspect them—beyond the 25 mile radius 3 inspectors. To inspect them there would be additional salaries and travel expense.

Rec. Page

325 There are between 475 and 500 farms now supplying Madison; hence the 950 additional farms are not needed to supply Madison.

I have gone through the Chicago Ordinance. There are some important differences between it and the Madison Ordinance.

326 Section 7.09 (16) (h): "The Department of Public Health shall select samples as conditions may warrant and order them to be tested in a qualified laboratory for special analysis, such as special claims of vitamin content, digestibility claims, etc., at the licensee's expense.

And "(c)": (Reading): "All plant records of quantities of milk or milk products purchased and disposed of, and control tests shall be available for inspection by an officer of the Department of Public Health. These records shall be for any previous six months period."

And under "(d)": (Reading.): "If at any time an officer of the Department of Public Health finds insufficient or inefficient equipment or any irregularity in the approved process of manufacture of any milk or milk product such dealer shall be deemed guilty of violation of this ordinance."

And I found no similar provisions—I was unable to find any similar provisions in the Chicago Ordinance.

And, second, Section 7.09, 21, the Madison Ordinance that relates to the average bacterial plate count, average direct microscopic count, average reduction time, average cooling temperature, all are averages of the last three consecutive samples. In the Chicago Ordinance, Section 3082-R, these aver-

Rec. Page

ages are averages of the last four consecutive samples.

327 That would make the requirement of the Madison Ordinance higher because average is over 3 samples rather than four.

328 Section 7.09 (22) Madison Ordinance requires inspection of dairy plants and receiving stations at least monthly. Chicago Ordinance Section 3082-S—at such periods as the Board of Health may designate. Chicago Board of Health adopted June 30, 1940, designates it—I should have read that six months period instead of monthly—from January 1 to June 30 and from June 30 to December 31 of each year. • • • Whereas ours goes through the summer and, necessarily, through summer months when our conditions might not be as good as they are in the winter time.

329 Section 7.13, Madison Ordinance. If health commissioner finds a violation of serious enough nature, and serious enough is in quotation marks, he may immediately suspend the permit until corrections are made. • • • Chicago Section 3091 does not permit suspension if inspector finds a violation on his first inspection. It requires a second inspection after a lapse of time necessary to correct the defect and then the second inspection governs. • • • And I have a notation that Chicago in this section says that any violation of the ordinance on two consecutive inspections shall be cause for revocation of the permit, and apparently that is not mandatory.

330 Madison states that the violation of the same item of the ordinance on more than two consecutive in-

Rec.
Page

spections shall call for immediate suspension, and that appears to be mandatory.

Again in Madison, 7.13 in the last two sentences, Madison requires its plant field men to forward copies of their inspection to the Health Commissioner. This gives the Health Commissioner reports in addition to his own inspections. Chicago has no such provision.

Another item here, the Chicago Board of Health on September 28, 1942, adopted a resolution that whenever any person or firm refuses to make available to the City of Chicago all the milk of such person or firm when needed, the inspection given to the farms, plants and equipment of such person or firms shall be withdrawn.

Of course, that means that in time of shortage any Chicago inspected firm would have to shut off its outside business, if necessary, and send all of its milk to Chicago, and in that way prevent the communities that had formerly gotten part of that milk from getting it at a time when they would probably likewise have an insufficient supply of milk, or require the same communities to turn toward other sources of supply which might be uninspected or so-called emergency milk.

Madison, Section 7.14 requires the taking of samples of milk from each farm and each plant, at least monthly, and throughout the summer. That would be throughout the summer. In Chicago, 3092 says that during each six months' inspection period as
331 many samples will be taken as the Board of Health may require. Accompanying regulations says they

Rec.
Page

will be taken at least four times during each six months' period.

Madison, Section 7.14 in the next to the last paragraph provides if four consecutive samples are beyond the limits of the ordinance as to average bacterial count, reduction time or cooling temperature, the permit shall be immediately suspended provided notice of the first three has been given the producer. And no similar provision in the Chicago regulation or in Section 3092 which I read a moment ago. And it merely states that four or more samples of a given milk supply shall be examined before determining the average bacterial quality.

Madison, 7.15 (2) sub. something—(c)—provides for exclusion of cows with active induration or disease of one or more quarters of the udder. Apparently there was no such exclusion in the Chicago Ordinance.

In Madison, 7.15, the same section, under (3) provides that dairy barns shall have three square feet of window space per stanchion and box stall and will require under new construction that they be four square feet instead of three.

Chicago, Section 3093, Item 2-R, states that barns should have three square feet of light per cow. And, of course, they agree with us.

Now, Madison 7.15 (8).

332 A. 7.15 (8). 7.15 and Article 8 requires manure be removed from the barn daily to a distance of 50 feet, and Chicago, 3093, Item 7-R provides storage of the manure at least 30 feet from the barn is preferred. So we throw ours about, apparently, 20 feet further.

Rec. Page

(General laughter.)

A. Now, on the construction point—we are talking about cattle, I am sorry.

Mr. Geffs: Maybe that is where we get our football players. A. I didn't mean to be facetious.

On milk house construction, Madison, Section 7.15 (9) (a) requires that the floor be provided with an approved trap drain and Chicago doesn't have such a requirement.

And the same section, (9) (d) requires ventilation of at least 100 square inches, and Chicago, 3093, 8-R, says "well ventilated." That is in quotation marks and regulation 8-R (c) says "ventilator of 100 square inches is preferred." It is required in the Madison Ordinance.

Madison, Section 7.15 (9) (f) requires that the milk house door be at least six feet from the milking barn. And Madison, 7.15, again, (9) (h) requires facilities to heat the milk house, and Chicago has no such—the Chicago Ordinance does not.

333 Madison, Section 7.15 (24) requires that milk be cooled immediately after the completion of milking to 60 degrees Fahrenheit, or less, and Chicago, 3093, Item 23-R requires cooling, within one hour after the completion of milking to 65 degrees which is five degrees higher than ours and an hour later, 65 degrees, or less, and permits delivery of milk within one hour after the completion of milking without cooling.

I have brought out those because I felt that they pointed out the more stringent provisions in the Madison Ordinance.

Rec.
Page

These additional higher requirements of the Madison Ordinance in my opinion conduce to a higher and cleaner quality of milk. In my opinion milk which meet the Chicago Ordinance does not meet the Madison Ordinance.

334 In my opinion merely making a laboratory test is not sufficient to determine the quality and cleanness of milk. Although pasteurization will destroy bacteria in milk other materials can get into the milk and that can be guarded against only by constant and continuous inspection.

335 I don't think once a month is any too often because conditions on the farm may change. I would not trust any inspection outside of [redacted] jurisdiction beyond which we could have control and constant supervision, because personality enters into that type of work. There is no substitute for regular inspection by the city's own personnel.

336 I would not be willing to rely upon the inspectors of the Chicago Board of Health to inspect the source of supply of Madison's milk.

I would not be willing to rely upon the spot check conducted or supervised by the United States Public Health Service. A spot check does not inspect all farms and might not include all pasteurization plants.

Madison uses the plate count test. As to its relative merits compared with the methylene blue test, they are not necessarily parallel. The U. S. P. H. S., I think, model ordinance, requires a six hour or longer reduction time in the methylene blue test or
337 a 200,000 plate count, and they do not, and it has been shown, are not parallel. You can have a six

Rec. Page

hour or more reduction time, which means—which would mean a pretty good test and yet have the count well over 200,000 bacterial on a plate count at the same time. There is an advantage without a doubt of the methylene blue, particularly in these larger areas where they have many, many tests to make. It is more rapid, much less expensive and, I think, less accurate, not accurate enough for the Madison Ordinance.

337 *Cross Examination by Mr. Geffs.*

I am an assistant health officer, not in charge of milk inspection except in the absence of Dr. Kincaid. My field in the City Health office is assisting in all matters of public health in the city of Madison, examinations and immunizations in the schools, tuberculin testing and assisting the Health Commissioner in any way he desires.

338 I think I am qualified to testify whether the U. S. Model Milk Ordinance (Exhibit 1) prescribes reasonable method of assuring pure and sanitary milk but I don't know what you mean by reasonable, and I won't use my own definition because I may not define it correctly.

339 Q. Well, anyway, I will take your definition of it.

Mr. Hanson: Have you got one in reference to this matter? A. Not to this. I don't know what to say.

Mr. Geffs: Q. Well, in other words, I take it you can't answer the question? A. I won't answer it to satisfy you, if I do.

Q. Well, I wasn't exactly demanding that you do

Rec.
Page

that. Q. You mean, is it reasonable so far as the City of Madison is concerned?

Q. Yes. A. Then I say it is unreasonable.

Q. It is unreasonable? And in what respects?

A. It is unreasonable because it is not a model in the sense that one calls for something perfect. It is a model that states and communities can model after, if you please, setting down minimum requirements, not maximum, minimum. And that the United States Public Health Service cannot criticize us if we are within the limits of the model ordinance. Neither can it criticize us if we are in excess of it and it is the privilege of every community and every state to go as far as it needs to go in order to safeguard its infants and children and growing individuals and adults by whatever more stringent methods or requirements are needed to satisfy that particular location, and I am thinking of Madison now.

Q. I call your attention to Exhibit 2, the proposed
340 revised milk ordinance recommended by the United States Public Health Service, and I ask you that if a city in southern Wisconsin adopted the provisions of that revised milk ordinance in regard to the sanitation of the farms and the pasteurization plants, and for the inspections called for in that revised milk ordinance, if, in your opinion now, that that city would be reasonably safe of securing pure, wholesome, sanitary milk? A. Reasonably pure?

Q. Yes. A. No, I don't think so.

Q. So that you heard the testimony, did you not, of Birmingham, Alabama, and those southern cities obtaining milk up here? A. Yes, I did.

Rec. Page

Q. It is your testimony now, under oath, that those southern cities by not coming up here and inspecting every farm themselves, are not protecting the health of their citizens, they are not doing their duty in protecting the health of their citizens, is that your testimony? A. They are doing their duty insofar as they have to or need to because they are entirely different. They wouldn't be coming way up here for milk if they had enough down there.

Q. They are doing their duty in respect to the health of their citizens? A. They are fulfilling the minimum requirements of this model milk ordinance.

341 Q. And doing their duty in respect to the health of their citizens, is that right? A. Legally, perhaps.

Q. I am asking you as an expert, are they doing their duty in respect to the health of their citizens?

A. They are doing all that they need to do, but I don't see how they can be sure of it. They are not inspecting. You people have to inspect, everyone does, or rely on someone else.

342 Q. Now, Dr. Fauerbach, from your study of the Chicago Milk Ordinance, it is your judgment, then, that the Grade A pasteurized milk produced and pasteurized under that ordinance and sold in the City of Chicago, Illinois, is unsafe for human consumption? A. I didn't say that.

Q. I say, is that your judgment? I didn't say what you said. A. You asked me, I thought you said—

Q. Is that your judgment? A. That it is unsafe?

Q. For human consumption? A. Not necessarily.

Q. Well, by "not necessarily" do you mean that

Rec. Page

it is safe for human consumption? A. I wouldn't say at all times.

Q. Well, let's take right at this time. You got through reviewing the ordinance. At this time, is it your judgment it is safe for human consumption?

A. In Chicago?

Q. Yes, Grade A pasteurized milk, pasteurized according to the Chicago Ordinance? In your judgment, is that safe for human consumption? A. I can answer only about Madison. I don't think I am qualified to answer that for Chicago.

Q. I am asking you as an expert. You are a doctor? A. I would like to answer it this way:
343 If the inspections of the farms and the dairy plants are efficiently and adequately made and the laboratory tests are within the limit of your ordinance, I would say yes.

Q. That is, if these inspections, you mean, are made according to the Chicago Ordinance, you say if the inspections are efficiently made, you mean the inspections provided for in the Chicago Ordinance?

A. They wouldn't satisfy us.

Q. No, I am not asking you that. I am just asking what you meant by your answer. You say if these inspections are efficiently made: You mean the inspections called for in the Chicago Ordinance?

A. I don't think they are often enough.

Q. I am not asking you that question.

A. You are asking me to answer that question on the ordinance.

Q. Well, then, what is your answer? Is the milk produced under the Chicago Milk Ordinance, Grade

Rec. Page

A pasteurized milk, in your judgment, is that safe for human consumption, milk sold in Chicago?

Mr. Hanson: I object as improper cross examination? A. I can't answer that.

Mr. Geffs: Q. That is, you have no opinion one way or the other, is that it? A. I expressed an opinion.

Q. Well, what is it?

The Court: He said depending on the inspection
344 and other elements, did he not?

Mr. Geffs: He said inspections. I asked him if he referred to inspections in the Chicago Ordinance.

Q. Is that the inspections you were referring to?

The Court: There isn't any inspection in the ordinance.

Mr. Geffs: Well, provided for.

The Court: The inspection is on the farm.

Mr. Geffs: No, the inspection provided for.

Q. Is that the inspections you were referring to? You said if it was efficiently done.

A. I think I modified that by saying it wasn't done often enough in our opinion. Insofar as our own—

Q. I will come to that later. Let's get this one question straight, this one question and answer. Now, is it your judgment as an expert that the milk produced and inspected under the Chicago Ordinance that you have been discussing here, sold in Chicago as Grade A pasteurized milk, is it safe for human consumption? You can answer that yes or no.

The Court: Mr. Geffs, may I respectfully ask what has that to do with my decision on the Constitutionality of this Madison Ordinance?

Mr. Geffs: It has this to do: • • •

Rec. Page

The Court: I am not judging between milk sold in the two cities, am I? I am not expert enough for that.

Mr. Geffs: Your Honor, it has this to do with it: As I understand the law, milk that is reasonably
345 safe for human consumption sold in interstate commerce cannot be barred out, and it cannot be barred out by each city passing some ordinance and putting in some little restriction of their own. That is the law as I understand it, and I think the question here is relevant. That is why I am asking the question.

Mr. Hanson: I object to this question upon the ground that it is improper cross examination and a matter not covered on direct examination and this witness has not attempted to qualify himself as an expert on the sufficiency of the inspection under the Chicago Milk Ordinance.

Mr. Geffs: I didn't ask him about the efficiency of it. He did discuss here in great detail the Chicago Milk Ordinance and I am asking him to assume that the milk in the City of Chicago sold as Grade A milk is produced, inspected pasteurized according to the provisions of the Chicago Milk Ordinance: Now, in your judgment, do you thing that Grade A milk is safe for human consumption?

The Court: The Court will sustain the objection to that question.

I was acting health commissioner when Dean Milk Company made its application to sell milk here.
346 I made no investigation of the Dean Milk Company or its products. I made no investigation of any outside product.

Rec. Page

I was in and out so often as acting health commissioner I can not tell the exact number of months I served; my last term was January to July, 1948.

Under my administration Grade A milk labeled as such was never sold in Madison. I don't know whether our old ordinance provided for Grade A milk or not.

347 Before milk can be sold as Grade A milk in Madison it must comply with the provisions of the new ordinance. Up to the present time, October 11, 1949, no milk is being sold labeled as Grade A in the City of Madison. A good many of these regulations of the new ordinance of which I am speaking have not been enforced. That is not possible when the ordinance went into effect August 27th. Every effort is now being made to bring farms and dairies or anything else checked up to the provisions of the ordinance. The milk being sold today in Madison is safe for human consumption.

348 I think the milk sold in Madison is safe for human consumption notwithstanding the fact that all of the provisions of the new ordinance are not being complied with.

Mr. Hanson: Exhibit 40, entitled "Wisconsin Crop and Livestock Reporter," issued by the United States Department of Agriculture and Wisconsin Department of Agriculture, Volume 28, Number 4, dated April, 1949, contains the following statistics as to number of cattle, heads of producing cows and total milk production in Dane County for 1948, and certain other countries in the south district, as follows: Heads of cattle in Dane County, 138,200; heads of cattle in the counties of Columbia, Dane, Dodge, Green, Jef-

Rec. Page

ferson and Rock, 545,700; heads of producing cows in Dane County, 89,300; heads of producing cows in Columbia, Dane, Dodge, Green Jefferson and Rock County, 341,900; total milk production, hundredweight, Dane County, 6,429,600, 1948; total milk pro-
349 duction, Columbia, Dane, Dodge, Green, Jefferson and Rock Counties for 1948, hundredweight, 24,-155,800.

CLARENCE LUCHTERHAND, called as witness in behalf of defendants, testified as follows:

I live at 514 Blackhawk Avenue, Madison, Wisconsin. I am the milk sanitarian for the State Board of Health. My duties are to work with local health departments to advise them and help them organize their programs and also the educational programs, and organize the sanitation programs and also aid them in survey work if they so request.

Q. Are you familiar with the program of the United States Public Health Service in sponsoring the model ordinance covering the milk code?

A. We do work with the representative of the United States Public Health Service and have recommended the milk ordinance and code Bulletin 200,
350 1939 edition for these various cities.

We work directly in state service. There is a federal monetary aid to the State Board of Health in sponsoring this program.

I am acquainted with Section 11 of the U. S. Model Ordinance. Assuming that a city adopted the Model Ordinance and Section 11 of it, the city would not

Rec.
Page

necessarily have to rely upon the test system or checking system sponsored by the U. S. Department of Health.

351 I am familiar with the so-called spot checks.

Q. What is its function? What is it used for and how is it conducted? A. The rating system was primarily set up to help evaluate and to determine the enforcement procedures of a health department. It is also used by other health departments to determine whether or not the milk supply which is coming into an area is under comparable supervision and under comparable regulations.

Q. Would you go into the further part of my question and tell us how they conduct that check?

A. It is a spot check system which is set up on a scientific basis, a number of farms are taken out of a certain group and the farms are picked at random. The farms are picked and checked in accordance with the check sheets of the United States Public Health Service Ordinance. From there on then after the survey has been completed, these check sheets have been--the information is placed on a master sheet where the rating is computed.

Q. Is there any set formula by which the number of farms or number of dairy plants in a given area to be inspected are calculated? A. Yes, there is, if I may quote from the Methods of Making Sanitation Ratings of Milk Sheds. Bulletin 1970.

Q. Before you do that, there is nothing official about that? That isn't any law or ordinance?

A. This is just a recommended procedure to help
352 health departments have uniform regulations to help

Rec. Page

them make their procedures more uniform and also to help evaluate so that receiving markets may also know what is going on.

I am reading from "Methods of Making Sanitation Ratings of Milk Sheds," Reprint No. 1970, issued by the U. S. Public Health Service, August 12, 1938. That procedure is still in effect.

The number of farms surveyed at random is 25 out of 25 to 54. And of 55 to 59 farms, 26 are taken; of 60 to 64, 27 farms are taken; out of 65 to 71 farms, 28 are taken; do you want me to go through the entire list?

Q. Yes.

A. Out of 72 to 78, 29; 79 to 86, 30; 87 to 94, 31; 95 to 105, 32; 106 to 116, 33; 117 to 130, 34; 131 to 147, 35; 148 to 167, 36; 168 to 191, 37; 192 to 222, 38; 223 to 262, 39; 263 to 316, 40; 317 to 394, 41; 395 to 514, 42; 515 to 725, 43; 726 to 1,192, 44; 1,193 to 5,000, 50; 5,000 to 10,000, 100; 10,000 and over, 200.

353 I would guess there are 10,000 farms or more in the Chicago milk shed and a spot check would include 200 farms. They would use the same proportion in picking out pasteurization plants at random.

The check would extend over a period of several weeks and it is possible that the municipal body requesting such a check would get a check or sampling of farms in the producing area and it is possible that it might not give an accurate indication of the actual milk that was produced on the majority of the farms in that area.

354 Q. Assuming that a city wished to obtain such a check, would they get a sampling of the entire milk

Rec.
Page

shed of the Chicago producing area or would they get a check of a portion of such shed? A. That would depend upon the receiving area. If the receiving area issued a request for a specific plant, the survey would be made on a specific plant. If it would only desire the milk shed survey, they would be given the figures on the milk shed survey.

Q. Is a new check made by the Public Health Service every time a check is requested, or do they give them the result of the last check that was made?

A. In some of the correspondence which we have had, we have found they were giving—certain sheds were given the rating of the last check unless a specific request was made of a plant.

Q. Are those checks made as often as they are requested or is the requesting municipality furnished the last check if that check has been made within a reasonable time? A. Many municipalities will accept the last check. It is up to—it is a prerogative of the health department of the municipality as to whether or not they are going to accept it.

Q. As I understand, this model milk code, as its name implies, is a model code containing minimum requirements? A. That's right.

Q. The United States Public Health Service, as I understand, doesn't insist that any municipality adopt such a code, adhere strictly to the form of the model ordinance? A. A municipality will be given
355 credit for up-grading.

Q. And municipalities which use this model form in many instances do put in more stringent requirements? A. We have tried to recommend uniformity.

Rec.
Page

We have found it isn't too well to deviate too far due to the fact that sometimes upward gradings are harmful to the industry and also confusing to the public. We have always recommended to try to keep as uniform as possible.

Q. But you certainly don't object to any city introducing higher requirements in the ordinance?

A. No, sir.

Q. Is reciprocal inspection permitted under the Chicago Milk Ordinance? A. I am not familiar with that section—I should say I am not familiar with the Chicago Ordinance to the fullest extent.

Q. If a city wants to permit milk from an outside area to be introduced into its city, there is nothing in the model code which says that the city has to rely on the United States Public Health spot check system?

A. No, sir. That is entirely a voluntary procedure. If the local health officer wishes to satisfy himself that the producing market is under equal regulations and equal supervision, why, he can make his own checks.

Q. Is there any statement in that document you have referred to which evaluates this spot check system? A. Yes, there is a summary. If I may quote?

Q. Referring to page 13? A. Page 13, Signifi-
356 cance of Ratings.

Q. Would you read that, please? A. "These ratings are compliance ratings and not safety ratings. A high rating does not necessarily mean that all of the milk supplies sold in the community in question are safe, nor does low rating necessarily mean that

Rec.
Page

all of the milk supplies sold in a community are unsafe. Neither the present rating method nor any other rating method thus far devised is an absolute measure of safety. Nevertheless, a pasteurized milk rating of 90 per cent determined as previously described does mean that the pasteurized milk supplies in general of the community in question are as safe as a reasonably strict enforcement of the milk ordinance recommended by the Public Health Service will make them. Citizens who permit their purchases of milk to Grade A pasteurized milk secured from communities with 90 per cent ratings may, for all practical purposes, ignore the danger of milk-borne infection. The safest communities from the standpoint of milk-borne disease are those in which all milk is pasteurized and in which the pasteurized milk rating is 90 per cent or more."

Would you wish me to continue?

Q. If there is anything more. A. "However, in the vast majority of communities it has not yet been possible to secure the pasteurization of all milk supplies. For these communities the retail raw milk
357 rating portrays the degree to which there have been applied such measures as will make raw milk as safe as practicable short of pasteurization. Such of these communities as attain retail raw milk ratings of at least 90 per cent know that they have protected that part of their population which persists in drinking raw milk at least as much as raw milk consumers can practicably be protected. In communities in which any raw milk is permitted to be sold, the health officers should persistently advise milk consumers who

Rec.
Page

insist upon purchasing raw milk or who cannot secure properly pasteurized milk, to purchase Grade A raw or certified raw milk and pasteurize it at home."

And they continue on with the method of pasteurization.

Q. Now, Mr. Luchterhand, would you recommend that a city adopting a milk ordinance, either the suggested model milk ordinance which you have referred to or one of the others, whether or not it should rely entirely upon the spot check system which is referred to in this booklet? A. If you go through Section 11 of the ordinance you will note that it states the health officer shall satisfy himself that the producing market is under equivalent regulation and equivalent rigid supervision. Now, he can determine that either by himself or accepting the rating procedure,

358 We believe that the milk supply should be under supervision and that the city should inspect the farms and the dairies unless the producing market under some other health department is under equally rigid supervision. The local health officer should assure himself that the other producing area is under rigid supervision.

It would be difficult to answer whether a health commissioner of a particular city could reasonably conclude that the spot check system advocated by the U. S. Public Health Service would not be as efficient as that made by some other method, that would be a prerogative of the local health officer.

359 The purpose of this rating method is not to take the place of regular inspection but is to evaluate the enforcement methods of a health Department.

Rec.
Page

Cross Examination by Mr. Geffs.

The booklet that I was reading from, "The Methods of Making Sanitation Ratings of Milk Sheds"—marked Exhibit 42.

360 (Exhibit 42 received in evidence).

When I said that we recommend Public Bulletin 220, Milk Ordinance, I meant the Wisconsin Department of Public Health recommends it and that bulletin is your Exhibit 1.

The Wisconsin Department of Public Health recommends the U.S. Model Milk Ordinance and Code to the cities of Wisconsin for adoption.

We recommend Section 11 of the U.S. Model Milk Ordinance and Code.

361 The suggestion of the U. S. Model Milk Code at P. 145 reads, "It is suggested that the health officer
361 approve milk or milk products from distant points without his inspection if they are produced and processed under regulations equivalent to those of this ordinance, and if the milk or milk products have been awarded by the state control agency a rating of 90 per cent or more on the basis of the Public Health Service rating method."

I believe your testimony was that in your opinion a health officer of the municipality receiving the milk is justified in relying upon that suggestion, is that correct? A. He shall satisfy himself and he can do that by either accepting this rating method or making his own check.

Q. This rating method you speak of, the United States Public Health Service, does not take the place

Rec.
Page

of the inspection made by each municipality in its own locality, is that correct? A. That is correct.

Q. And so when they rate, they rate for the purpose of evaluating the efficiency of the inspection that is being made? A. Yes.

Q. Have you any rating on the Chicago milk shed?

A. We have copies of correspondence that has taken place between the Illinois State Health Department and the various health departments in the state.

362 I have the correspondence with me.

(Letter is marked Exhibit 43)

Exhibit 43 is a letter received in due course of mail in regard to the rating of the Chicago Milk Shed, involving the Hawthorne Melody Dairy of Chicago, Illinois, and addressed to the City Health Department of the City of Janesville, Wisconsin.

This letter, Exhibit 43, is a summary of the survey which was made on September 8th to the 24th, 1947, and is as follows:

U. S. Public Health Service rating of raw milk sold to plants 91.05%.

U. S. Public Health Service rating of pasteurization plants, 98.42%.

363 United States Public Health Service rating of pasteurized milk, 92.24 per cent.

United States Public Health Service rating of enforcement methods, 93.90 per cent.

This is in accordance with the rating methods as set forth in the bulletin 1970.

Q. Those rating methods show a satisfactory compliance as of the date when they were made?

Rec. Page

A. And in accordance with the code.

Q. In accordance with the code.

(Exhibit 43 received in evidence).

Q. Now, I show you Exhibit 3 and you may take a moment to read it. A. (Reading paper.)

Q. Now, Exhibit 3 in regard to the Dean Milk Company "operating under permit from the Chicago Board of Health, which has adopted the recommended Milk Ordinance and Code of the Public Health Service is included in the last survey rating of the Chicago milk shed made cooperatively by the Public Health Service and the Illinois State Department of Public Health.

"This survey gave a rating of raw milk sold to plants of 91.05 per cent and a rating of pasteurization plants of 93.42 per cent."

364 Now, does that show that the rating is satisfactory?

A. It indicates that the Chicago Health Department is conducting its enforcement procedure in accordance with the code.

Q. Mr. Luchterhand, I call your attention to Exhibit 2. It is the revised milk ordinance recommended by the United States Public Health Service, and ask you to read Section 11. You may read it out loud, of the revised code. A. (Reading.) "Section 11. Milk and Milk Products from Points Beyond the Limits of Routine Inspection. Milk and milk products from points beyond the limits of routine inspection of the municipality of Blank may not be sold in the municipality of Blank, or its police jurisdiction, unless produced and/or pasteurized under provisions

Rec. Page

which are substantially equivalent to the requirements of this ordinance and which are enforced with equal effectiveness as determined by a milk sanitation rating."

Q. That milk sanitation rating that they refer to is a rating made by the United States Public Health Service? A rating of the efficiency of the enforcement, is that correct? A. Yes, that is my understanding.

Q. That is what Mr. Hanson has been referring to as a spot check or spot survey? A. I believe so.

Q. That is how they make the rating. Now, Mr.
365 Luchterhand, are you acquainted with the provisions of the present Madison City Ordinance that prohibits the sale of milk in the City of Madison that is not pasteurized within five miles of the City Square? Are you acquainted with that provision? A. I have heard it in testimony today.

Q. Yes. In your judgment is that a necessary health provision?

Mr. Hanson: I object to it as improper cross examination. It wasn't gone into on direct examination.

The Court: It is not proper cross examination, Mr. Geffs. This man is not your witness. This man testified as to spot checks.

Mr. Geffs: I don't mind making him my witness. Let him answer. He is from the Board of Health.

The Court: Go ahead.

Mr. Geffs: All right.

Q. In your judgment is that a necessary health measure? A. I believe it is the prerogative of the local community.

Rec.
Page

Q. In your judgment do you thing that is necessary to protect the health of Madison or do you believe that the City of Madison could rely upon the provisions set forth in the model milk ordinance?

A. If a supply is under effective inspection and equivalent regulations which satisfy the local health department and the local officials, it is my judgment that is not necessary.

Q. And it is your judgment that their—strike that.
366 Let me put it like this: In your judgment the United States Public Health Service is trustworthy and can be relied upon, can't they? A. Yes, sir.

Q. And if they certify that the rating is 90 per cent or better of another area, then the City of Madison would be reasonably safe in accepting their certification and receiving the milk in Madison, is that correct? A. If they so certify and the local health officer be satisfied.

Q. I am asking your opinion. If they are so certified, is it your judgment they would be reasonably safe? A. If they so certify and with the reservation that the local health officer still should satisfy himself.

Q. Satisfy himself that the inspection in the producing area is being adequately done? A. That is right.

Q. Now, in regard to the 25 mile limitation of the Madison Ordinance: It your judgment is that a necessary health measure under present day circumstances with this milk being inspected by Chicago? A. I believe that every necessary protection should be given to the milk supply that is coming from certain areas.

Rec.
Page

If every necessary protection has been given to protect the health of the consuming public from the possibility of pathogenic organisms entering the milk, then it is not in the realm of public health.

367 Q. And by that answer you mean that if the Chicago milk is adequately inspected, then it is a safe supply of milk? A. I would say if any milk supply is rigidly inspected and under rigid regulations, that the consumer can assure himself that that supply is reasonably safe.

Q. And by those regulations you would include Exhibit 1, the ordinance, the regulations provided for in Exhibit 1 as being adequate regulations. Is that right? A. With the local prerogative that the local folks may put in upward revisions.

Q. I am talking about the producing area where the milk is produced. If it is produced under regulations of Exhibit 1, the model milk ordinance, in your judgment it is produced under adequately safe conditions? A. I would believe so.

Q. Produced and pasteurized under adequately safe conditions? A. I believe so.

368 Q. Mr. Luchterhand, I will ask you this question: At the present time you are working in cooperation with the United States Public Health Service, aren't you? A. Yes, sir.

Q. And you are doing that because the State Department of Agriculture of Wisconsin is trying to qualify milk to comply with the model milk ordinance so that when that milk is approved by you as Grade A pasteurized milk, I mean by the State Board of Health as Grade A milk, so that it will be received

Rec. Page

outside of the State of Wisconsin without those people having to come up and inspect, isn't that right?

A. That's right.

Q. There is a big program now going on, it is now in the process of being made by the Department of Agriculture here in Wisconsin, isn't that true?

A. That is true.

369 Q. Well, you don't feel in your judgment you and the Board of Health of the State of Wisconsin in your effort to have Wisconsin milk meet the requirements of the model milk ordinance as Grade A pasteurized milk and certified by yourself as meeting the requirements and selling that milk out of the State, you don't feel you are putting insanitary milk off on those people, do you?

Mr. Hanson: I object to immaterial how he feels.

The Court: Can you answer it, sir? A. I could answer it this way: We take pride in our work in Wisconsin and any information we might forward to any health department will be the information as exact as we possibly can get it.

Mr. Geffs: Q. Now, the receiving area that receives this Wisconsin milk, they will make inquiries from the United States Public Health Service, is that true? A. Yes, sir.

Q. And the United States Public Health Service will give a rating on the efficiency of your inspection
370 here in Wisconsin, is that true? A. On the efficiency of our certification and the efficiency of the inspection work by the Department of Agriculture.

Q. If it rates 90 per cent or better then in your judgment the people in the foreign states are perfectly safe in accepting milk from Wisconsin?

Rec. Page

A. That is our feeling, yet it is the prerogative of those folks whether or not they will accept it.

Mr. Geffs: That is all.

Redirect Examination by Mr. Hanson.

In my opinion the city of Madison has an efficient inspection system. As stated in my earlier testimony the spot check of the U. S. Public Health Service is not to aid local inspection but is an evaluation of the enforcement procedures.

The Chicago milk shed extends over a wide area. I cannot give you the number of states.

371 I understand that Exhibit 3 is the rating of the whole Chicago milk shed, as that is the way the letter reads.

372 It is possible that a spot check might not include the Dean farms and pasteurization plants.

(Witness reads Exhibit 43 out loud).

373 The letter (Exhibit 43) states that it is a rating of the whole Chicago milk shed. It is possible that there may not have been any farms included which supply Hawthorne Melody Dairy and it is possible that pasteurization plants might not have been included.

374 A. The background to this is the fact that this ordinance (U. S. Model Milk Ordinance) is reviewed every two to five years by an advisory committee. This advisory committee consists of outstanding men in the public health and industry and these men receive the comments from various health departments and other agencies having milk control work. With the comments they receive, the ordinance is revised

Rec. Page

and passed upon by the advisory committee and recommended to the United States Public Health Service which, in turn, recommends it to the local people interested.

Q. Has the United States Public Health Service recommended Exhibit 2? A. This ordinance, as it stands today, has been passed by the advisory committee.

Q. But not the United States Public Health Service? A. And the United States Public Health service will follow through on its recommendation.

Q. But you don't know when that recommendation will be? A. To my knowledge thaere is only one revision or one change which may be made or will be made, and that is in Item 8-R. The last paragraph in Item 8-R will be changed to a footnote.

Q. My point is it has not been recommended by the United States Public Health Service? A. Yes.

Q. I though you said it was recommended by the advisory committee? A. And the United States Public Health Service followed through.

375 Q. They have followed through already? A. Yes, that information has been given to me.

I testified as to the possibilities that the Dean farms and Hawthorne Melody farms might have been missed in a spot check. I cannot answer as to the probabilities.

Milk sold in Madison today could not be labelled as Grade A under the U. S. model code but it is my understanding that the local health department is bringing their producing farms and plants up so that they can obtain a Grade A label.

Rec. Page

376 But they have not reached that stage at the present time.

MR. STARR NICHOLS, called as a witness in behalf of the defendants, testified as follows:

I live in Madison; am assistant director of the Wisconsin State Laboratory of Hygiene.

377 I am professor of Sanitary Chemistry at University of Wisconsin; have Ph.D. degree, then connected with State Laboratories since 1916. The State Laboratory make analyses for physicians and private citizens in the control of public health in the state.

378 There are two classes in which I give lectures concerning sanitation of milk.

Milk is an important food, susceptible to contamination. In our laboratory we sterilize and kill all organisms present.

379 The air is full of bacteria. Milk should be pasteurized. But there should be other safeguards, healthy cows, produced in a clean manner, refrigerated so that bacteria can not grow.

I think it is necessary to exercise constant and close supervision over cattle and the place where the milk is produced and the place where processed.

An ordinance is not sufficient. It must be enforced. It is not unreasonable for Madison to require inspection of plants and farms.

Madison could not rely upon checks made by inspectors of other producing areas unless they know how these inspections are made, how frequently these inspections are made and who they are made by.

Rec. Page

381 I think pasteurization plants should be within a reasonable distance of Madison. Farms should be within a reasonable distance, because you have better control over production.

Within reason the pasteurization plant have some relation to the farms that produce their milk, but with modern refrigeration that is not so important.

The bacteria tests are the direct count and the standard agar plate count and methylene blue count, resazurin test.

382 Q. What have you to say as to the relative merits of the plate count as distinguished from the methylene blue test? A. The methylene blue test, to me, is a quick test which has much merit and the agar plate count is still considered the better of the two if you have the facilities for making the one or the other. The direct count, to me, on raw milk is probably more indicative of the quality of that milk than either one of the two others.

Cross Examination by Mr. Geffs.

It would be no detriment to the milk supply if all of the above tests were made to determine the bacteria count.

What I have said about milk being easily contaminated is also true of fresh meat. Fresh meat will be attacked by microorganisms if it isn't preserved or sterilized.

383 I have never been a health director of any city. I have one inspector on my staff which inspects the University supply of milk.

Q. Is that milk Grade A milk used on the Uni-

Rec. Page

versity Campus? A. I don't know exactly what that milk is. It tests quite satisfactorily most of the time.

Certified pasteurized milk is the highest grade.

384 The next would be Grade A pasteurized milk; next Grade B pasteurized milk but I wouldn't want to use that necessarily.

It is my understanding that Grade A pasteurized milk is sold in Madison today.

I don't know what labels are on the bottles. I don't know whether the Madison Ordinance is being enforced.

385 Defendants' original answer marked Exhibit 44 received in evidence.

386 Madison Milk Ordinance of August 27, 1949 marked Exhibit 45 received in evidence.

Testimony closed.

405 EXHIBIT 1.

PUBLIC HEALTH BULLETIN.

No. 220.

(1939 Edition)

UNITED STATES PUBLIC HEALTH SERVICE MILK ORDINANCE.

(This unabridged form of the ordinance should be adopted only where the short enabling form in part I is not considered legal.)

An ordinance defining "milk" and certain "milk products," "milk producer," "pasteurization," etc., prohibiting the sale of adulterated and misbranded milk and milk products, requiring permits for the

Rec.
Page

sale of milk and milk products, regulating the inspection of dairy farms and milk plants, the examination, grading, labeling, placarding, pasteurization, regrading, distribution, and sale of milk and milk products, providing for the publishing of milk grades, the construction of future dairies and milk plants, the enforcement of this ordinance, and the fixing of penalties.

Be it ordained by the.....of the city of .....as follows:

Section 1. *Definitions.*—The following definitions shall apply in the interpretation and the enforcement of this ordinance:

A. *Milk.*—Milk is hereby defined to be the lacteal secretion obtained by the complete milking of one or more healthy cows, excluding that obtained within 15 days before and 5 days after calving, or such longer period as may be necessary to render the milk practically colostrum free; which contains not less than 8 percent of milk solids not fat, and not less than 3¼ percent of milk fat.

* * *

B. *Milk or butter fat.*—Milk fat or butter fat is
406 the fat of milk.

C. *Cream and sour cream*—Cream is a portion of milk which contains less than 18 percent milk fat. Sour cream is cream the acidity of which is more than 0.20 percent, expressed as lactic acid.

D. *Skimmed milk.*—Skimmed milk is milk from which a sufficient portion of milk fat has been removed to reduce its milk-fat percentage to less than 3¼ percent.

Rec.
Page

E. *Milk or skimmed-milk beverage.*—A milk beverage or a skimmed-milk beverage is a food compound or confection consisting of milk or skimmed milk, as the case may be, to which has been added a sirup or flavor consisting of wholesome ingredients.

F. *Buttermilk.*—Buttermilk is a product resulting from the churning of milk or cream, or from the souring or treatment by a lactic acid or other culture of milk, skimmed milk, reconstituted skimmed milk, evaporated or condensed milk or skimmed milk, or milk or skimmed-milk powder. It contains no less than 8 percent of milk solids not fat.

G. *Vitamin D milk.*—Vitamin D milk is milk the vitamin D content of which has been increased by a method and in an amount approved by the health officer.

H. *Reconstituted or recombined milk and cream.*—Reconstituted or recombined milk is a product resulting from the recombining of milk constituents with water, and which complies with the standards for milk fat and solids not fat of milk as defined herein. Reconstituted or recombined cream is a product resulting from the combination of dried cream, butter, or butter fat with cream, milk, skimmed milk, or water.

I. *Goat milk.*—Goat milk is the lacteal secretion, free from colostrum, obtained by the complete milking of healthy goats, and shall comply with all the requirements of this ordinance. The word "cows" shall be interpreted to include goats.

Q. *Homogenized milk.*—Homogenized milk is milk which has been treated in such manner as to insure

Rec.
Page

break-up of the fat globules to such an extent that after 48 hours storage no visible cream separation occurs on the milk and the fat percentage of the top 100 cc. of milk in a quart bottle, or of proportionate volumes in containers of other sizes, does not differ by more than 5 percent of itself from the fat percentage of the remaining milk as determined after thorough mixing.

K. *Milk products.*—Milk products shall be taken to mean and include cream, sour cream, homogenized milk, goat milk, vitamin D milk, buttermilk, skimmed milk, reconstituted or recombined milk and cream,
407 milk beverages, skimmed-milk beverages, and any other product made by the addition of any substance to milk or any of these products and used for similar purposes and designated as a milk product by the health officer.

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L. *Pasteurization.*—The terms "pasteurization," "pasteurized," and similar terms shall be taken to refer to the process of heating every particle of milk or milk products to at least 143° F., and holding at such temperature for at least 30 minutes., or to at least 160° F., and holding at such temperature for at least 15 seconds, in approved and properly operated equipment; *Provided,* That nothing contained in this definition shall be construed as disbarring and other process which has been demonstration to be equally efficient and is approved by the State health authority.

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Rec.
Page

M. *Adulterated milk and milk products.*—Any milk or milk product which contains any unwholesome substance, or which if defined in this ordinance does not conform with its definition, or which carries a grade label unless such grade label has been awarded by the health officer and not revoked, shall be deemed adulterated and misbranded.

• • •

N. *Milk producer.*—A milk producer is any person who owns or controls one or more cows a part or all of the milk or milk products from which is sold or offered for sale.

O. *Milk distributor.*—A milk distributor is any person who offers for sale or sells to another any milk or milk products for human consumption as such.

P. *Dairy or dairy farm.*—A dairy or dairy farm is any place or premises where one or more cows are kept, a part or all of the milk or milk products which is sold or offered for sale.

408 Q. *Milk plant.*—A milk plant is any place or premises or establishment where milk or milk products are collected, handled, processed, stored, bottled, pasteurized, or prepared for distribution.

R. *Health Officer.*—The term "health officer" shall mean the health authority of the city of ....., or his authorized representative.

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S. *Average bacterial plate count, direct microscopic count, reduction time, and cooling temperature.*—Average bacterial plate count and average direct microscopic count shall be taken to mean the logarithmic

Rec.
Page

average, and average reduction time, and average cooling temperature shall be taken to mean the arithmetic average, of the respective results of the last four consecutive samples, taken upon separate days, irrespective of the date of grading or regrading.

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T. *Grading period.*—The grading period shall be such period of time as the health officer may designate within which grades shall be determined for all milk and milk products, provided that the grading period shall in no case exceed 6 months.

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U. *Person.*—The word "person" as used in this ordinance shall mean "person, firm, corporation, or association."

V. *And/or.*—Where the term "and/or" is used "and" shall apply where possible, otherwise "or" shall apply.

409 Sec. 2. *The sale of adulterated milk, or ungraded milk or milk products prohibited.*—No person shall within the city of ....., or its police jurisdiction, produce, sell, offer, or expose for sale, or have in possession with intent to sell, any milk or milk product which is adulterated, misbranded, or ungraded. It shall be unlawful for any person, elsewhere than in a private home, to have in possession any adulterated, misbranded, or ungraded milk or milk product.

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Sec. 3. *Permits.*—It shall be unlawful for any person to bring into or receive into the city of ....., or its police jurisdiction, for sale, or to sell, or offer

Rec.
Page

for sale therein, or to have in storage where milk or milk products are sold or served, any milk or milk product defined in this ordinance, who does not possess a permit from the health officer of the city of .....

Only a person who complies with the requirements of this ordinance shall be entitled to receive and retain such a permit.

Such a permit may be suspended by the health officer, or revoked after an opportunity for a hearing by the health officer, upon the violation by the holder of any of the terms of this ordinance.

• • •

Sec. 4. *Labeling and placarding.*—All bottles, cans, packages, and other containers enclosing milk or any milk product defined in this ordinance shall be plainly labeled or marked with (1) the name of the contents as given in the definitions in this ordinance; (2) the grade of the contents; (3) the word "pasteur-
410 ized" only if the contents have been pasteurized; (4) the word "raw" only if the contents are raw; (5) the phrase "for pasteurization" if the contents are to be pasteurized; (6) the name of the producer if the contents are raw, and the name of the plant at which the contents were pasteurized, if the contents are pasteurized: and (7) in the case of Vitamin D milk, the designation "Vitamin D Milk" and the source of the Vitamin D. The label or mark shall be in letters of a size, kind, and color approved by the health officer and shall contain no marks or words which are misleading.

Every restaurant, cafe, soda fountain, or other

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establishment serving milk or milk products shall display at all times, in a place designated by the health officer, a notice approved by the health officer, stating the lowest grade of milk and/or milk products served.[4]

12 Sec. 5. *Inspection of dairy farms and milk plants for the purpose of grading or regrading.*—At least once during each grading period the health officer shall inspect all dairy farms and all milk plants whose milk or milk products are intended for consumption within the city of ....., or its police jurisdiction. In case the health officer discovers the violation of any item of sanitation, he shall make a second inspection after a lapse of such time as he deems necessary for the defect to be remedied, but not before the lapse of 3 days; and the second inspection shall be used in determining the grade of milk and/or milk products. Any violation of the same item of this ordinance on two consecutive inspections shall call for immediate degrading.

One copy of the inspection report shall be posted by the health officer in a conspicuous place upon an inside wall of one of the dairy farm or milk plant buildings, and said inspection report shall not be defaced or removed by any person except the health officer. Another copy of the inspection report shall be filed with the records of the health department.

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Sec. 6. *The examination of milk and milk prod-*
417 *ucts.*—During each grading period at least four sam-

[4]Cities in which only grade A pasteurized milk or only certified milk and grade A pasteurized milk are permitted to be sold may delete this paragraph and nevertheless be recognized as having adopted this ordinance.

Rec.
Page

ples of milk and cream from each dairy farm and each milk plant shall be taken on separate days and examined by the health officer. Samples of other milk products may be taken and examined by the health officer as often as he deems necessary. Samples of milk and milk products from stores, safes, soda fountains, restaurants, and other places where milk or milk products are sold shall be examined as often as the health officer may require. Bacterial plate counts and direct microscopic counts shall be made in conformity with the latest standard methods recommended by the American Public Health Association.[5] Examinations may include such other chemical and physical determinations as the health officer may deem necessary for the detection of adulteration, these examinations to be made in accordance with the latest standard methods of the American Public Health Association and the Association of Official Agricultural Chemists.[5] Samples may be taken by the health officer at any time prior to the final delivery of the milk or milk products. All proprietors of stores, cafes, restaurants, soda fountains, and other similar places shall furnish the health of-

[5]Municipalities in which the adoption of legislation by reference is not considered legal may substitute the following wording: "• • • in conformity with the regulations of the health officer (or board of health)." If the regulations then adopted by the health officer are equivalent to those contained in the reference thus replaced, they will not be considered as constituting a downward revision of the U. S. Public Health Service milk ordinance.

All other references in this ordinance to standards and methods not specifically described may be treated in the same manner, such as the requirements of the American Association of Medical Milk Commissions under the definition of certified raw milk, the requirements of the Bureau of Animal Industry relative to accredited herds and modified accredited areas in item 1r, and the U. S. Public Health Service milk code in section 15.

Rec.
Page

ficer, upon his request, with the names of all distributors from whom their milk and milk products are obtained. Bio-assays of the vitamin D content of vitamin D milk shall be made when required by the health officer in a laboratory approved by him for such examinations.

Whenever the average bacterial count, the average reduction time, or the average cooling temperature falls beyond the limit for the grade then held, the health officer shall send written notice thereof to the person concerned, and shall take an additional sample, but not before the lapse of 3 days, for determining a new average in accordance with section 1 (S). Violation of the grade requirement by the new average or by any subsequent average during the remainder of the current grading period shall call for immediate degrading or suspension of the permit, unless the last individual result is within the grade limit.

* * *

423 Sec. 7. *The grading of milk and milk products.*— At least once every 6 months the health officer shall announce the grades of all milk and milk products delivered by all producers or distributors and ultimately consumed within the city of ....., or its police jurisdiction. Said grades shall be based upon the following standards, the grading of milk products being identical with the grading of milk except that the bacterial standards shall be doubled in the case of cream, and omitted in the case of sour cream and buttermilk. Vitamin D milk shall be only

Rec.
Page

of grade A or grade B pasteurized, certified, or grade A raw quality.

• • •

424 *Certified milk-raw.*—Certified milk-raw is raw milk which conforms with the requirements of the American Association of Medical Milk Commissions[6] in force at the time of production and is produced under
425 the supervision of a medical milk commission and of the State board of health or of the city or county health officer of .....

• • •

Grade A raw milk.—Grade A raw milk is raw milk the average bacterial plate count of which as determined under sections 1 (S) and 6 of this ordinance does not exceed 50,000 per cubic centimeter, or the average direct microscopic count of which does not exceed 50,000 per cubic centimeter if clumps are counted or 200,000 per cubic centimeter if individual organisms are counted, or the average reduction time of which is not less than 8 hours: *Provided*, That if it is to be pasteurized the corresponding limits shall be 200,000 per cubic centimeter, 200,000 per cubic centimeter, 800,000 per cubic centimeter, and 6 hours, respectively; and which is produced upon dairy farms conforming with all of the following items of sanitation.

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ITEM 1r. *Cows, tuberculosis and other diseases.*—Except as provided hereinafter, a tuberculin test of all herds and additions thereto shall be made before

[6]See footnote 5, p. 7.

Rec.
Page

any milk therefrom is sold, and at least every 12 months thereafter, by a licensed veterinarian approved by the State livestock sanitary authority. Said tests shall be made and reactors disposed of in accordance with the requirements approved by the United States Department of Agriculture, Bureau of Animal Industry,[6] for accredited herds. A certificate signed by the veterinarian or attested to by the health officer and filed with the health officer shall be evidence of the above test: *Provided*, That in modified accredited counties in which the modified accredited area plan is applied to the dairy herds the modified accredited area system approved by the United States Bureau of Animal Industry[6] shall be accepted in lieu of annual testing.

Within .....[7] years after the adoption of this ordinance all milk and milk products consumed raw shall be from herds or additions thereto which have been found free from Bang's disease, as shown by blood serum tests for agglutinins against *Brucelal abortus* made in a laboratory approved by the health officer. All such herds shall be retested at least every 12 months and all reactors removed from the herd.
426 A certificate identifying each animal by number, and signed by the laboratory making the test, shall be evidence of the above test.

Cows which show an extensive or entire induration of one or more quarters of the udder upon physical examination, whether secreting abnormal milk or not,

[6]See footnote 5, p. 7.

[7]The number should be inserted when the ordinance is adopted. It should not exceed 5 years if the community wishes to be recognized as having adopted this ordinance.

Rec.
Page

shall be permanently excluded from the milking herd. Cows giving bloody, stringy, or otherwise abnormal milk, but with only slight induration of the udder, shall be excluded from the herd until re-examination shows that the milk has become normal.

For other diseases such tests and examinations as the health officer may require shall be made at intervals and by methods prescribed by him, and any diseased animals or reactors shall be disposed of as he may require.

• • •

427 ITEM 2r. *Dairy barn, lighting.*—A dairy or milking barn shall be required and in such sections thereof where cows are milked windows shall be provided and kept clean and so arranged as to insure adequate light properly distributed, and when necessary shall be provided with adequate supplementary artificial light.

• • •

ITEM 3r. *Dairy barn, air space and ventilation.*—Such sections of all dairy barns where cows are kept or milked shall be well ventilated and shall be so arranged as to avoid overcrowding.

• • •

428 ITEM 4r. *Dairy barn, floors.*—The floors and gutters of such part of all dairy barns in which cows are milked shall be constructed of concrete or other approved impervious and easily cleaned material, provided that if the milk is to be pasteurized tight wood may be used, shall be graded to drain properly, and shall be kept clean and in good repair. No horses, pigs, fowl, calves, etc., shall be permitted in parts of the barn used for milking.

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Rec. Page

431 ITEM 5r. *Dairy barn, walls and ceilings.*—The walls and ceilings of all dairy barns shall be whitewashed once each year or painted once every 2 years, or oftener, if necessary, or finished in an approved manner, and shall be kept clean and in good repair. In case there is a second story above that part of the barn in which cows are milked the ceiling shall be tight. If the feed room adjoins the milking space, it shall be separated therefrom by a dust-tight partition and door. No feed shall be stored in the milking portion of the barn.

* * *

432 ITEM 6r. *Dairy barn, cowyard.*—All cowyards shall be graded and drained as well as practicable and kept clean.

* * *

433 ITEM 7r. *Manure disposal.*—All manure shall be removed and stored or disposed of in such manner as best to prevent the breeding of flies therein or the access of cows to piles thereof.

* * *

435 ITEM 8r. *Milk house or room, construction.*—There shall be provided a milk house or milk room in which the cooling, handling, and storing of milk and milk products and the washing, bactericidal treatment, and storing of milk containers and utensils shall be done. (*a*) The milk house or room shall be provided with a tight floor constructed of concrete or other impervious material, in good repair, and graded to provide proper drainage. (*b*) It shall have wall and ceilings of such construction as to permit easy cleaning, and shall be well painted or finished in an ap-

Rec.
Page

proved manner. (*c*) It shall be well lighted and ventilated. (*d*) It shall have all openings effectively screened including outward-opening, self-closing doors, unless other effective means are provided to prevent the entrance of flies. (*e*) It shall be used for no other purposes than those specified above except as may be approved by the health officer; shall not open directly into a stable or into any room used for domestic purposes; shall, unless the milk is to be pasteurized, have water piped into it; shall be provided with adequate facilities for the heating of water for the cleaning of utensils; shall be equipped with two-compartment stationary wash and rinse vats, except that in the case of retail raw milk, if chlorine is employed as the principal bactericidal treatment, the three-compartment type must be used; and shall, unless the milk is to be pasteurized, be partitioned to separate the handling of milk and the storage of cleansed utensils from the cleaning and other operations, which shall be so located and conducted as to prevent any contamination of the milk or of cleaned equipment.

* * *

443 Item 9r. *Milk house or room, cleanliness and flies.* —The floors, walls, ceilings, and equipment of the milk house or room shall be kept clean at all times. All means necessary for the elimination of flies shall be used.

* * *

444 Item 10r. *Toilet.*—Every dairy farm shall be provided with one or more sanitary toilets conveniently located and properly constructed, operated, and main-

Rec.
Page

tained, so that the waste is inaccessible to flies and does not pollute the surface soil or contaminate any water supply.

• • •

449 Item 11r. *Water supply.*—The water supply for the milk room and dairy barn shall be properly located, constructed, and operated, and shall be easily accessible, adequate, and of a safe sanitary quality.

• • •

456 Item 12r. *Utensils, construction.*—All multi-use containers or other utensils used in the handling, storage, or transportation of milk or milk products must be made of smooth nonabsorbent material and of such construction as to be easily cleaned, and must be in good repair. Joints and seams shall be soldered flush. Woven wire cloth shall not be used for straining milk. All milk pails shall be of a small-mouth design approved by the health officer. The manufacture, packing, transportation, and handling of single-device containers and container caps and covers shall be conducted in a sanitary manner.

• • •

457 Item 13r. *Utensils, cleaning.*—All multi-use containers, equipment, and other utensils used in the handling, storage, or transportation of milk and milk products must be thoroughly cleaned after each usage.

• • •

Item 14r. *Utensils, bactericidal treatment.*—All multi-use containers, equipment, and other utensils used in the handling, storage, or transportation of milk or milk products shall between each usage be

Rec.
Page

subjected to an approved bactericidal process with steam, hot water, chlorine, or hot air.

• • •

463 Item 15r. *Utensils, storage.*—All containers and other utensils used in the handling, storage, or transportation of milk or milk products shall be stored so as not to become contaminated before being used.

• • •

464 Item 16r. *Utensils, handling.*—After bactericidal treatment no container or other milk or milk product utensil shall be handled in such manner as to permit any part of any person or his clothing to come in contact with any surface with which milk or milk products come in contact.

• • •

Item 17r. *Milking, udders and teats, abnormal milk.*—The udders and teats of all milking cows shall be clean and rinsed with a bactericidal solution at the time of milking. Abnormal milk shall be kept out of the milk supply and shall be so handled and disposed of as to preclude the infection of the cows and the contamination of milk utensils.

465 Item 18r. *Milking, flanks.*—The flanks, bellies, and tails of all milking cows shall be free from visible dirt at the time of milking.

• • •

Item 19r. *Milkers' hands.*—Milkers' hands shall be clean, rinsed with a bactericidal solution, and dried with a clean towel immediately before milking and following any interruption in the milking operation.

Rec. Page

Wet-hand milking is prohibited. Convenient facilities shall be provided for the washing of milkers' hands.

• • •

466 Item 20r. *Clean clothing.*—Milkers and milk handlers shall wear clean outer garments while milking or handling milk, milk products, containers, utensils, or equipment.

• • •

Item 21r. *Milk stools.*—Milk stools shall be kept clean.

• • •

467 Item 22r. *Removal of milk.*—Each pail of milk shall be removed immediately to the milk house or straining room. No milk shall be strained or poured in the dairy barn.

• • •

Item 23r. *Cooling.*—Milk must be cooled immediately after completion of milking to 50° F. or less, and maintained at that average temperature, as defined in section 1 (S), until delivery. If milk is delivered to a milk plant or receiving station for pasteurization or separation, it must be delivered within 2 hours after completion of milking or cooled to 70° F. or less and maintained at that average temperature until delivered.

• • •

471 Item 24r. *Bottling and capping.*—Milk and milk products shall be bottled from a container with a readily cleanable valve, or by means of an approved bottling machine.

472 Bottles shall be capped by machine. Caps or cap stock shall be purchased in sanitary containers and kept therein in a clean dry place until used.

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Rec.
Page

Item 25r. *Personnel, health.*—The health officer or
➪ a physician authorized by him shall examine and take a careful morbidity history of every person connected with a retail raw dairy, or about to be employed, whose work brings him in contact with the production, handling, storage, or transportation of milk, milk products, containers, or equipment. If such examination or history suggests that such person may be a carrier of or infected with the organisms of typhoid or paratyphoid fever or any other communicable diseases likely to be transmitted through milk, he shall secure appropriate specimens of body discharges and cause them to be examined in a laboratory approved by him or by the State health authorities for such examinations, and if the results justify such person shall be barred from such employment.

Such persons shall furnish such information, submit to such physical examinations, and submit such laboratory specimens as the health officer may require for the purpose of determining freedom from infection.

* * *

473 Item 26r. *Miscellaneous.*—All vehicles used for the transportation of milk or milk products shall be so constructed and operated as to protect their contents from the sun and from contamination. All vehicles used for the transportation of milk or milk products in their final delivery containers shall be constructed with permanent tops and with permanent or roll-down sides and back, provided that openings of the size necessary to pass the delivery man may be permitted in the sides or back for load-

Rec.
Page

ing and unloading purposes. All vehicles shall be kept clean, and no substance capable of contaminating milk or milk products shall be transported with milk or milk products in such manner as to permit contamination. All vehicles used for the distribution of milk or milk products shall have the name of the distributor prominently displayed.

The immediate surroundings of the dairy shall be kept in a neat, clean condition.

• • •

474 *Grade B raw milk.*—Grade B raw milk is raw milk which violates the bacterial standard and/or the abortion testing requirement for grade A raw milk, but which conforms with all other requirements for grade A raw milk, and has an average bacterial plate count not exceeding 1,000,000 per cubic centimeter, or an average direct microscopic count not exceeding 1,000,000 per cubic centimeter if clumps are counted or 4,000,000 per cubic centimeter if individual organisms are counted, or an average reduction time of not less than 3½ hours, as determined under sections 1 (S) and 6.

Grade C raw milk.—Grade C raw milk is raw milk which violates any of the requirements for grade B raw milk.

Certified milk-pasteurized.—Certified milk-pasteurized is certified milk-raw which has been pasteurized, cooled, and bottled in a milk plant conforming with the requirements for grade A pasteurized milk.

Grade A pasteurized milk.—Grade A pasteurized milk is grade A raw milk, with such exceptions

Rec.
Page

as are indicated if the milk is to be pasteurized, which has been pasteurized, cooled, and bottled in a milk plant conforming with all of the following items of sanitation and the average bacterial plate count of which at no time after pasteurization and until delivery exceeds 30,000 per cubic centimeter, as determined under sections 1 (S) and 6.

The grading of a pasteurized milk supply shall include the inspection of receiving and collecting stations with respect to items 1p to 15p, inclusive, and 17p, 19p, 22p, and 23p, except that the partitioning requirement of item 5p shall not apply.

• • •

475 Item 1p. *Floors.*—The floors of all rooms in which milk or milk products are handled or stored or in which milk utensils are washed shall be constructed of concrete or other equally impervious and easily cleaned material and shall be smooth, properly drained, provided with trapped drains, and kept clean.

• • •

476 Item 2p. *Walls and ceilings.*—Walls and ceilings of rooms in which milk or milk products are handled or stored or in which milk utensils are washed shall have a smooth, washable, light-colored surface and shall be kept clean.

• • •

Item 3p. *Doors and windows.*—Unless other effective means are provided to prevent the access of flies, all openings into the outer air shall be effectively screened and doors shall be self-closing.

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Rec.
Page
477 Item 4p. *Lighting and ventilation.*—All rooms shall be well lighted and ventilated.

• • •

Item 5p. *Miscellaneous protection from contamination.*—The various milk-plant operations shall be so located and conducted as to prevent any contamination of the milk or of the cleaned equipment. All means necessary for the elimination of flies shall be used. There shall be separate rooms for (*a*) the pasteurizing, processing, cooling, and bottling operations, and (*b*) the washing and bactericidal treatment of containers. Cans of raw milk shall not be unloaded directly into the pasteurizing room. Pasteurized milk or milk products shall not be permitted to come in contact with equipment with which unpasteurized milk or milk products have been in contact, unless such equipment has first been thoroughly cleaned and subjected to bactericidal treatment. Rooms in which milk, milk products, cleaned utensils, or containers are handled or stored shall not open directly into any stable or living quarters. The pasteurization
478 plant shall be used for no other purposes than the processing of milk and milk products and the operations incident thereto, except as may be approved by the health officer.

• • •

479 Item 6p. *Toilet facilities.*—Every milk plant shall be provided with toilet facilities conforming with the ordinances of the city of ..... Toilet rooms shall not open directly into any room in which milk, milk products, equipment, or containers are handled or stored. The doors of all toilet rooms shall be self-

Rec. Page

closing. Toilet rooms shall be kept in a clean condition, in good repair, and well ventilated. In case privies or earth closets are permitted and used, they shall be separate from the building, and shall be of a sanitary type constructed and operated in conformity with the requirements of item 10r, grade A raw milk.

• • •

480 Item 7p. *Water supply.*—The water supply shall be easily accessible, adequate, and of a safe, sanitary quality.

• • •

Item 8p. *Hand-washing facilities.* — Convenient hand-washing facilities shall be provided, including warm running water, soap, and approved sanitary towels. The use of a common towel is prohibited.

• • •

481 Item 9p. *Sanitary piping.*—All piping used to conduct milk or milk products shall be "sanitary milk piping" of a type which can be easily cleaned with a brush. Pasteurized milk and milk products shall be conducted from one piece of equipment to another only through sanitary milk piping.

• • •

482 Item 10p. *Construction and repair of containers and equipment.*—All multi-use containers and equipment with which milk or milk products come in contact shall be constructed in such manner as to be easily cleaned and shall be kept in good repair. The manufacture, packing, transportation, and handling of single-service containers and container caps

Rec. Page

and covers shall be conducted in a sanitary manner.

• • •

484 Item 11p. *Disposal of wastes.*—All wastes shall be properly disposed of.

• • •

Item 12p. *Cleaning and bactericidal treatment of containers and equipment.*—All milk and milk products containers and equipment, except single-service containers, shall be thoroughly cleaned after each usage. All containers shall be subjected to an approved bactericidal process after each cleaning and all equipment immediately before each usage. When empty and before being returned to a producer by a milk plant each container shall be effectively cleaned and subjected to bactericidal treatment.

• • •

487 Item 13p. *Storage of containers and equipment.*—After bactericidal treatment all bottles, cans, and other multi-use milk or milk-products containers and equipment shall be stored in such manner as to be protected from contamination.

• • •

Item 14p. *Handling of containers and equipment.*—Between bactericidal treatment and usage, and during usage, containers and equipment shall not be handled or operated in such manner as to permit contamination of the milk.

• • •

488 Item 15p. *Storage of caps, parchment paper, and single-service containers.*—Milk-bottle caps or cap stock, parchment paper for milk cans, and single-service containers shall be purchased and stored only

Rec.
Page

in sanitary tubes and cartons, respectively, and shall be kept therein in a clean dry place.

Item 16p. *Pasteurization.*—Pasteurization shall be performed as described in section 1 (L) of this ordinance.

• • •

526 Item 17p. *Cooling.*—All milk and milk products received for pasteurization shall immediately be cooled in approved equipment to 50° F. or less and maintained at that temperature until pasteurized, unless they are to be pasteurized within 2 hours after receipt; and all pasteurized milk and milk products shall be immediately cooled in approved equipment to an average temperature of 50° F. or less, as defined in section 1 (S), and maintained thereat until delivery.

• • •

535 Item 18p. *Bottling.*—Bottling of milk and milk products shall be done at the place of pasteurization in approved mechanical equipment.

• • •

536 Item 19p. *Overflow milk.*—Overflow milk or milk products shall not be sold for human consumption.

• • •

Item 20p. *Capping.*—Capping of milk and milk products shall be done by approved mechanical equipment. Hand capping is prohibited. The cap or cover shall cover the pouring lip to at least its largest diameter.

• • •

537 Item 21p. *Personnel, health.*—The health officer or a physician authorized by him shall examine and take

Rec. Page

a careful morbidity history of every person connected with a pasteurization plant, or about to be employed, whose work brings him in contact with the production, handling, storage, or transportation of milk, milk products, containers, or equipment. If such examination or history suggests that such person may be a carrier of or infected with the organisms of typhoid or paratyphoid fever or any other communicable diseases likely to be transmitted through milk, he shall secure appropriate specimens of body discharges and cause them to be examined in a laboratory approved by him or by the State health authorities for such examinations, and if the results justify such person shall be barred from such employment.

Such persons shall furnish such information, submit to such physical examinations, and submit such laboratory specimens as the health officer may require for the purpose of determining freedom from infection.

Item 22p. *Personnel, cleanliness.*—All persons coming in contact with milk, milk products, containers, or equipment shall wear clean outer garments and shall keep their hands clean at all times while thus engaged.

• • •

538 Item 23p. *Miscellaneous.*—All vehicles used for the transportation of milk or milk products shall be so constructed and operated as to protect their contents from the sun and from contamination. All vehicles used for the transportation of milk or milk products in their final delivery containers shall be constructed with permanent tops and with permanent or roll-down sides and back, provided that openings of the size

Rec.
Page

necessary to pass the delivery man may be permitted in the sides or back for loading and unloading purposes. All vehicles shall be kept clean, and no substance capable of contaminating milk or milk products shall be transported with milk or milk products in such manner as to permit contamination. All vehicles used for the distribution of milk or milk products shall have the name of the distributor prominently displayed.

The immediate surroundings of the milk plant shall be kept in a neat, clean condition.

Grade B pasteurized milk.—Grade B pasteurized milk is pasteurized milk which violates the bacterial standard for Grade A pasteurized milk and/or the provision of lip-cover caps of item 20p and/or the requirement that grade A raw milk be used, but which conforms with all other requirements for grade A pasteurized milk, has been made from raw milk of not less than grade B quality, and has an average bacterial plate count after pasteurization and before delivery not exceeding 50,000 per cubic centimeter, as determined under sections 1 (S) and 6.

Grade C pasteurized milk.—Grade C pasteurized milk is pasteurized milk which violates any of the requirements for grade B pasteurized milk.

SEC. 8. *Grades of milk and milk products which may be sold.*—From and after 12 months from the date on which this ordinance takes effect no milk or milk products shall be sold to the final consumer or to restaurants, soda fountains, grocery stores, or similar establishments except[8]: *Pro-*

[8]See footnote 2, p. 2.

Rec.
Page

vided, That when any milk distributor fails to qualify for one of the above grades the health officer is
539 authorized to revoke his permit,[9] or in lieu thereof to degrade his product and permit its sale during a temporary period not exceeding 30 days or in emergencies such longer period as he may deem necessary.

Sec. 9. *Supplementary grading prescribed and regrading authorized.*—If, at any time between the regular announcements of the grades of milk or milk products, a lower grade shall become justified, in accordance with sections 5, 6, and 7 of this ordinance, the health officer shall immediately lower the grade of such milk or milk products, and shall enforce proper labeling and placarding thereof.

Any producer or distributor of milk or milk products the grade of which has been lowered by the health officer, and who is properly labeling his milk and milk products, may at any time make application for the regrading of his product.

Upon receipt of a satisfactory application, in case the lowered grade is the result of an excessive average bacterial plate count, direct microscopic count, reduction time, or cooling temperature, the health officer shall take further samples of the applicant's output, at a rate of not more than two samples per week. The health officer shall regrade the milk or milk products upward whenever the average of the last four sample results indicates the necessary quality, but not before the lapse of 2 weeks from the date of degrading.

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[9]See footnote 2, p. 2.

Rec.
Page

In case the lowered grade of the applicant's product is due to a violation of an item of the specifications prescribed in section 7, other than average bacterial plate count, direct microscopic count, reduction time, or cooling temperature, the said application must be accompanied by a statement signed by the applicant to the effect that the violated item of the specifications has been conformed with. Within 1 week of the receipt of such an application and statement the health officer shall make a reinspection of the applicant's establishment, and thereafter as many additional reinspections as he may deem necessary to assure himself that the applicant is again complying with the higher grade requirements, and, in case the findings justify, shall regrade the milk or milk products upward; but not before the lapse of 2 weeks from the date of degrading.

540 Sec. 10. *Transferring or dipping milk; delivery containers; handling of more than one grade; delivery of milk at quarantined residences.*—Except as permitted in this section, no milk producer or distributor shall transfer milk or milk products from one container to another on the street, or in any vehicle or store, or in any place except a bottling or milk room especially used for that purpose. The sale of dip milk is hereby prohibited.

All pasteurized milk and milk products shall be placed in their final delivery containers in the plant in which they are pasteurized, and all raw milk and milk products sold for consumption in the raw state shall be placed in their final delivery containers at the farm at which they are produced. Milk and milk

Rec.
Page

products sold in the distributor's containers in quantities less than 1 gallon shall be delivered in standard milk bottles or in single-service containers. It shall be unlawful for hotels, soda fountains, restaurants, groceries, and similar establishments to sell or serve any milk or milk product except in the original container in which it was received from the distributor or from a bulk container equipped with an approved dispensing device: *Provided,* That this requirement shall not apply to cream consumed on the premises, which may be served from the original bottle or from a dispenser approved for such service.

It shall be unlawful for any hotel, soda fountain, restaurant, grocery, or similar establishment to sell or serve any milk or milk products which have not been maintained, while in its possession, at a temperature of 50° F. or less.

No milk or milk products shall be permitted to come in contact with equipment with which a lower grade of milk or milk products has been in contact unless such equipment has first been thoroughly cleaned and subjected to bactericidal treatment.

541 Bottled milk or milk products, if stored in water, shall be so stored that the tops of the bottles will not be submerged.

It shall be the duty of all persons to whom milk or milk products are delivered to clean thoroughly the containers in which such milk or milk products are delivered before returning such containers. Apparatus, containers, equipment, and utensils used in the handling, storage, processing, or transporting of milk or milk products shall not be used for any other purpose without the permission of the health officer.

Rec.
Page

The delivery of milk or milk products to and the collection of milk or milk products containers from residences in which cases of communicable disease transmissible through milk supplies exist shall be subject to the special requirements of the health officer.

543 Sec. 11. *Milk and milk products from points beyond the limits of routine inspection.*—Milk and milk products from points beyond the limits of routine inspection of the city of.....may not be sold in the city of....., or its police jurisdiction, unless produced and/or pasteurized under provisions equivalent to the requirements of this ordinance: *Provided,* That the health officer shall satisfy himself that the health officer having jurisdiction over the production and processing is properly enforcing such provisions.

This section is intended to permit the health officer to bar milk and milk products shipped in from great distances unless he can assure himself that they meet the provisions of the ordinance. Under no conditions should the health officer authorize the receipt of such shipments if arrangements cannot be made for supervision, unless an emergency exists, in which case permission should be given for its receipt, provided it is labeled "ungraded milk" when distributed.

It is suggested that the health officer approve milk or milk products from distance points without his inspection if they are produced and processed under regulations equivalent to those of this ordinance, and if the milk or milk products have been awarded by the State control agency a rating of 90 percent or more on the basis of the Public Health Service rating method.

Rec.
Page

Section 12. *Future Dairies and Milk Plants.*—All dairies and milk plants from which milk or milk products are supplied to the city of.....which are hereafter constructed, reconstructed, or extensively altered shall conform in their construction to the requirements of this ordinance for grade A dairy farms producing milk for consumption in the raw state, or for grade A pasteurization plants, respectively: *Provided*, That the requirement of a two-room milk house shall be waived in the case of dairies the milk from which is to be pasteurized. Properly prepared plans for all dairies and milk plants which are hereafter constructed, reconstructed, or extensively
544 altered shall be submitted to the health officer for approval before work is begun. In the case of milk plants signed approval shall be obtained from the health officer and/or the State health department.

• • •

Sec. 13. *Notification of disease.*—Notice shall be sent to the health officer immediately by any producer or distributor of milk or milk products upon whose dairy farm or in whose milk plant any infectious, contagious, or communicable disease occurs.

Sec. 14. *Procedure when infection suspected.* — When suspicion arises as to the possibility of transmission of infection from any person concerned with the handling of milk or milk products, the health officer is authorized to require any or all of the following measures: (1) The immediate exclusion of that person from milk handling, (2) the immediate exclusion of the milk supply concerned from dis-

Rec. Page

tribution and use, (3) adequate medical and bacteriological examination of the person, of his associates, and of his and their body discharges.

Sec. 15. *Enforcement interpretation.*—This ordinance shall be enforced by the health officer in accordance with the interpretations thereof contained in the
545 1939 edition of the United States Public Health Service Milk Code, a certified copy of which shall be on file in the city clerk's office.[10]

Sec. 16. *Penalty.*—Any person who shall violate any provision of this ordinance shall be fined not more than.....at the discretion of the court. Each and every violation of the provisions of this ordinance shall constitute a separate offense.

• • •

Sec. 17. *Repeal and date of effect.*—All ordinances and parts of ordinances in conflict with this ordinance are hereby repealed; and this ordinance shall be in full force and effect immediately upon its adoption and its publication, as provided by law.

Sec. 18. *Unconstitutionality clause.* — Should any section, paragraph, sentence, clause, or phrase of this ordinance be declared unconstitutional or invalid for any reason, the remainder of said ordinance shall not be affected thereby.

561-580 EXHIBIT 2.

"Revised Milk Ordinance Recommended by the U. S. Public Health Service." Only the important changes from Exhibit one printed.

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[10]See footnote 5, p. 7.

Rec.
Page

Section 5. *Inspection of dairy farms and milk*
566 *plants.*—Prior to the issuance of a permit and at least once every 6 months thereafter, the health officer shall inspect all dairy farms and all milk plants, whose milk or milk products are intended for consumption within the municipality of....., or its police jurisdiction: *Provided,* That the health officer may accept the results of periodic industry inspections of producer dairies if such inspections have been officially checked periodically and found satisfactory. In case the health officer discovers the violation of any requirement he shall make a second inspection after a lapse of such time as he deems necessary for the defect to be remedied, but not before the lapse of 3 days, and the second inspection shall be used in determining compliance with the grade requirements of this ordinance. Any violation of the same requirement of this ordinance on such reinspection shall call for immediate (degrading,)* suspension of permit and/or court action.

Item 23r. *Cooling.*—Milk and milk products not for pasteurization shall be cooled immediately after com-
571-2 pletion of milking to 50° F. or less and maintained at that temperature until delivery, as determined in accordance with Section 6. Milk for pasteurization shall be cooled immediately after completion of milking to 60° F. or less and maintained at that temperature until delivered and dumped, except morning's milk delivered and dumped before .....A.M.** standard time, and night's milk delivered and dumped before .....P.M.**; and milk which does not comply with this requirement shall be subject to rejection.

Rec.
Page

Section 11. *Milk and milk products from points beyond the limits of routine inspection.*—Milk and milk products from points beyond the limits of rou-
579 tine inspection of the municipality of.....may not be sold in the municipality of.....,
or its police jurisdiction, unless produced and/or pasteurized under provisions which are substantially equivalent to the requirements of this ordinance and which are enforced with equal effectiveness as determined by a milk sanitation rating.

581 EXHIBIT 3.

Federal Security Agency
Public Health Service
Chicago 2, Illinois
(Copy)

September 23, m1949.

In replying, address the
Regional Medical Director, PHS
Federal Security Agency Region V
69 W. Washington Street

Dr. W. J. Corbett
Dean Milk Company
1126 Kilburn Avenue
Rockford, Illinois

Dear Sir:

In replying to your telephone conversation, the following information is noted.

The Dean Milk Company operating under permit from the Chicago Board of Health, which has adopted

Rec. Page

the recommended Milk Ordinance and Code of the Public Health Service is included in the last survey rating of the Chicago milkshed made cooperatively by the Public Health Service and the Illinois State Department of Public Health.

This survey gave a rating of raw milk sold to plants of 91.05% and a rating of pasteurization plants of 93.42%.

Very truly yours,
(s) Harold Wainess
Harold Wainess
Sanitarian (R)

582 EXHIBIT 4.

Oct. 1, 1949

Commissioner of Health
Madison, Wis.

In re: Dean Milk Co.

Dear Sir:—

Please deliver to the bearer 950 blank applications to be filled out by the owners of the farms which supply the milk to Dean Milk Company, as required by your new milk ordinance of August 27th, 1949.

Very truly yours,
McGowan, Geffs, Geffs & Block.
Jacob Geffs

JG/dr

Refused Oct. 1st because supply of forms inadequate and because present ordinance states past. plant must be within five miles of square and because temporary injunction was recently refused.

C. K. K.

Rec.
Page
809-812

EXHIBIT 40.

Wisconsin Crop and Livestock Reporter
April 1949 issue.

811

County	All Cattle Head	Milk Cows and Heifers 2 years old Head	Horses and Mules Head	All Hogs Head
Columbia				
Dane	138,200	94,500	8,700	135,700
Dodge				
Green				
Jefferson				
Rock				
	545,700	358,500	36,200	445,300

	Stock Sheep Head	Chicken Head	Egg Production 1949 (000 omitted number)	Producing Cows Head
Columbia				
Dane	7,700	844,700	119,947	89,300
Dodge				
Green				
Jefferson				
Rock				
	29,400	3,109,400	440,196	341,900

	Production per cwt. Per cwt.	Total Milk Production cwt.
Columbia		
Dane	72	6,429,600
Dodge		
Green		
Jefferson		
Rock		
	70.7	24,155,800

Rec.
Page

EXHIBIT 43.

DEPARTMENT OF PUBLIC HEALTH
Springfield

August 13, 1949

Mr. H. J. Burger, R. S.
City Health Department
Janesville, Wisconsin

Dear Mr. Burger:

Your letter regarding the Hawthorne Melody Dairy, 5524 W. Chicago Ave., Chicago, Illinois, has been referred to the Milk Section for a reply.

This office does not have ratings on the raw milk and pasteurized milk for individual plants. The Hawthorne Melody Dairy is under the supervision of the Chicago Board of Health. To the best of our knowledge, the milk supply and the milk-pasteurization plant comply with the standard Grade A milk ordinance and code. A survey of the Chicago milkshed was made on September 8-24, 1947, and the summary of survey results as follows:

U.S.P.H.S. rating of raw milk sold to plants	91.05%
U.S.P.H.S. rating of pasteurization plants	93.42%
U.S.P.H.S. rating of pasteurized milk	92.24%
U.S.P.H.S. rating of enforcement methods	93.90%

We are sorry that an individual rating is not available; however, we believe that the above survey is an accurate estimate of compliance with the U. S. Public Health Service Grade A milk ordinance and the Illinois Grade A milk law.

Rec.
Page

We are enclosing Educational Health Circular No. 135 containing the Illinois Grade A milk law and the minimum requirements for your guidance.

Very truly yours,
E. G. Huffer
Milk Sanitarian

egh/eh
enc.
cc: Mr. C. K. Luchterhand, Wisc. Board of Health.

EXHIBIT 44.

DEFENDANTS' ORIGINAL ANSWER.

Now come the defendants, appearing herein by Harold E. Hanson, City Attorney for the City of Madison, Wisconsin and as and for an answer to the complaint of the plaintiff herein respectfully allege and show to the Court as follows:

1. Defendants admit upon information and belief that the plaintiff is an Illinois corporation having its main business offices in the City of Chicago, Cook County, Illinois and that it operates a milk pasteurization plant in the City of Chemung, Illinois.

2. Defendants admit that they are the executive, legislative and some of the administrative offices of the City of Madison, Dane County, Wisconsin and that the said City of Madison is a municipal corporation.

3. Defendants admit that on or about the 14th day of February, 1930, the Common Council of the City of Madison, Wisconsin adopted an ordinance, a portion of which is set forth in paragraph 3 of the plaintiff's complaint and that at the time of the

Rec.
Doc.

controversy alleged in the complaint the said ordinance was in full force and effect and still is in full force and effect. The defendants, however, allege that the portion of the said ordinance so set forth in the plaintiff's complaint is a mere fragmentary portion of the ordinances of the City of Madison dealing with the entire subject of sale of milk and dairy products within the city and including standards for production, processing, manufacturing, transportation, handling, sale and delivery of such milk and dairy products and requiring inspection by the City Health Department of all dairy plants and all farms on which milk is produced for sale in the City of Madison. Attached hereto as Exhibit 1 and incorporated herein as though fully set forth herein is a copy of the portions of the Madison City Ordinances dealing with the said subjects of milk and dairy products, of which ordinances the section set forth in plaintiff's complaint is an integral part and which ordinances have been duly adopted and were in full force and effect at all times material to this controversy and still are in full force and effect.

4. Defendants admit that on or about the 8th day of March, 1948, the plaintiff herein made application to the City of Madison for a license to distribute pasteurized Grade A milk, cream and milk products in the City of Madison and that on or about the 12th day of March, 1949 the plaintiff was notified by the Health Commissioner of the said city that its request for a license was denied and there was returned the application fee of $1.00 deposited by the plaintiff at the time said application for

Rec. Page

license was filed; and further admit that Exhibit 1 attached to the complaint is a copy of a letter sent by the Health Commissioner of the City of Madison to the plaintiff herein on or about March 12, 1948.

5. Defendants deny that they have information or knowledge sufficient to form a belief as to whether the plaintiff is engaged in the purchase of Grade A milk from farm producers or in the pasteurization thereof or in the sale of said pasteurized milk to retail stores in cities or villages in the states of Illinois or Wisconsin and, consequently, deny the same and leave plaintiff to its proof thereof.

6. Defendants admit that the said application of the plaintiff for its said license was denied because plaintiff's pasteurization plant was located in Chemung, Illinois, more than five miles from the central portion of the City of Madison, otherwise known as the Capitol Square and at a distance of about 75 miles from Madison; but defendants allege that the said fact of location of the plaintiff's plant was the only fact considered in denying the plaintiff's application and further allege that they cannot now state that any further application for a license which might be made by the plaintiff would be granted, except for the fact of location of the plaintiff's plant.

7. Defendants deny that they have any information or knowledge sufficient to form a belief as to whether the milk which plaintiff intended to sell in the City of Madison, if its application for license had been granted, would comply or still does comply with the requirements of said ordinances of the

Rec. Page

City of Madison as to place of production, pasteurization, or requirements as to quality or sanitary conditions and consequently deny the same and leave plaintiff to its proof thereof.

8. Defendants further deny that they have any information or knowledge sufficient to form a belief as to whether, if the said license had been issued to plaintiff, it was plaintiff's intention to obtain the milk which it intended to sell in the City of Madison from its pasteurization plant in the City of Chemung, Illinois, after the same had been bottled and placed in paper cartons and then packed into a refrigerated truck and transported from said City of Chemung, Illinois and sold to various retail grocers in the City of Madison and consequently deny the same and leave plaintiff to its proof thereof. Defendants admit that such an intention had been expressed by plaintiff to the city authorities but allege, upon information and belief, that the plaintiff does in fact operate pasteurization plants other than that located in the City of Chemung, Illinois and that the milk from such other pasteurization plants is bottled in containers similar to those used at its Chemung plant, so that if the plaintiff were permitted to sell milk in the City of Madison, it would be difficult for city authorities to determine whether milk sold in the city had actually been processed and bottled at the Chemung, Illinois plant of plaintiff and whether it had actually been produced at inspected farms and was all Grade A milk.

9. Defendants admit that plaintiff has requested the City Council of the City of Madison to amend

Rec.
Page

its ordinances to eliminate the requirement that pasteurized milk sold in the City of Madison must be pasteurized within five miles of the central portion of the city, and further admit that the said City Council did hold open hearings upon the said request and that at such hearings the plaintiff appeared through its agents and attorneys and, among other arguments, did maintain that the said ordinance was unconstitutional. Defendants allege, however, that after full, due and open consideration of the said request and said arguments, the City Council declined so to amend the ordinances.

10. Defendants deny that the portion of the milk ordinance as set forth in the plaintiff's complaint or any other portion of said ordinance as attached hereto as Exhibit 1 is unconstitutional and further deny that any of such ordinances restricts or limits competition or fosters monopoly, or is in restraint of trade or violates any right of contract guaranteed under the Fourteenth Amendment to the Constitution of the United States, or is in any conflict with the Interstate Commerce Clause of the United States Constitution, Section 8, Article 1 or that it deprives plaintiff or anyone else of its property without due process of law or
890 is in conflict with or violation of any clauses or provisions of either the Constitution of the United States or the Constitution of the State of Wisconsin.

11. Defendants admit that by reason of the aforesaid, a controversy exists between plaintiff and defendants.

Rec.
Page

12. Defendants deny that they have information or knowledge sufficient to form a belief as to whether the plaintiff has been or is now willing to pay all reasonable inspection fees and charges in connection with its pasteurization plant and equipment located in Chemung, Illinois, or in connection with the reasonable inspection of the sources of production of the milk delivered to said plant and consequently deny the same and leave plaintiff to its proof thereof. Defendants further allege that plaintiff has not indicated to the city authorities what it considers reasonable inspection or reasonable inspection fees or charges.

13. Defendants further allege that the ordinances attached hereto as Exhibit 1 and specifically including the portion thereof set forth in the plaintiff's complaint, constitute necessary, reasonable and proper health regulations for the protection of the lives and health of the residents of the City of Madison. Milk and its products are not only one of the most important human foods but also the most perishable and most easily contaminated. Establishment and enforcement of rigid standards and continual inspection are required at all stages of production, transportation and sale of milk to assure an adequate supply of sanitary, healthful milk.

14. The City of Madison is located in almost the geographical center of Dane County, which has an area of approximately 1230 square miles and is one of the greatest milk producing counties in the entire United States. Dane County contains approximately 5600 separate farms which annually

Rec.
Page

produce about 650,000,000 pounds of milk; and the City of Madison, including the University of Wisconsin with its own processing plant located in the
891 city, consumes the milk production of only about 500 of those farms in an annual amount of about 60,000,000 pounds of milk, all as defendants are informed and verily believe. Other counties immediately adjoining Dane County are also very great producers of milk. Great quantities of milk produced in Dane and surrounding counties are also shipped to the Metropolitan Chicago markets and are also made into cheese, butter and evaporated, condensed and dried milk. All milk now sold as pasteurized milk in the City of Madison, being nearly all milk sold in the city, is now pasteurized and bottled at three separate plants all located within five miles of the Capitol Square in Madison and owned and operated by three separate companies. The natural result of the plants being located this near to the city and in the center of the tremendous milk producing area in Dane County, is that all milk pasteurized in those plants and sold in the City of Madison is produced on farms located within Dane County and within a radius of not more than twenty-five miles from the Capitol Square in Madison. Inspection by city health authorities of not only the pasteurization plants but also of all farms supplying those plants is thus made convenient and efficient and the cost of such inspection to the city and its taxpayers is kept within reasonable bounds, and the city is assured of an adequate supply of healthful and sanitary milk from known

Rec. Page

and inspected sources, all as these defendants are informed and verily believe.

15. Defendants are informed and verily believe that approximately 200 or more farms, located chiefly in the State of Illinois many miles from Madison, furnish milk to the Chemung, Illinois plant of plaintiff. Because it is impracticable to segregate in such a plant, the milk from particular farms delivering to the plant, in order to be assured that standards of milk production, processing and transportation required by the Madison ordinances are maintained, as to any milk delivered from such plant to the City of Madison, it would be necessary for the city health authorities regularly to inspect the said plant and 200 or more farms delivering to
892 it, even if the amount of milk from said plant sold in the City of Madison is very small, as defendants are informed and verily believe.

16. Without the portion of the Madison Ordinances which is complained of in plaintiff's complaint, any dairy company with a plant located any place in the country could demand a license to sell milk in the City of Madison which had been pasteurized and bottled in such plant, and no matter how small the quantity of milk that was so sold from such plant, the city would then be put to the unreasonable burden of frequent inspection and supervision of not only the plant itself but all of the farms delivering milk to such plant.

17. The Madison Health Department has on its staff one trained expert dairy sanitarian whose duties include the inspection of milk sold in Madi-

Rec. Page

son, of the dairy plants delivering to Madison and the farms delivering to such plants, which farms number approximately 400, other than those supplying the University of Wisconsin. Each of the three local dairy companies now selling milk in Wisconsin, exclusive of the University, and none of which companies is in any way financially connected with any other, also maintains a field man for farm inspection as does the farmers cooperative association, which represents many of the farmers delivering milk to the present Madison dairy companies; and these field men, who are familiar with Madison Health Department requirements, cooperate with the Madison Health Department in maintaining standards of production required by Madison Ordinances, all as defendants are informed and verily believe. If plaintiff were permitted to sell milk in Madison it would, without doubt, require at least one additional full time qualified dairy sanitarian on the staff of the City Health Department, adequately to inspect the plaintiff's plant and the farms delivering to it; thus unreasonably adding to the inconvenience and cost of milk inspection.

18. Changing economic conditions frequently may cause operators of dairy plants which serve other than established local markets, and particularly operators of plants which may have a variety of markets available to them, to shift from market to market from time to time, as defendants are informed and verily believe. If plants so operated and located at a distance from Madison are permitted to supply milk to Madison, such operations and the frequent

Rec. Page

fluctuation in inspection responsibilities of the City in the inspection of said plants and the farms supplying them would unreasonably burden the City of Madison.

Wherefore, the defendants pray that judgment be entered declaring the portion of the Madison Milk Ordinance as set forth in the plaintiff's complaint to be constitutional and valid, and for their costs and disbursements in this action and for such other and further relief as may be proper herein.

HAROLD E. HANSON,
City Attorney,
Madison, Wisconsin.

EXHIBIT.

895 7.08 *License for the Sale of Milk and Cream.* It shall be unlawful for any person, association, or corporation to sell, offer for sale, or have in his or its possession with intent to sell or deliver in the City of Madison any milk, cream, or milk products without having first obtained a license therefor from the clerk of said city as hereinafter provided.

7.09. *Applications for License.—Inspection.* (1) An application shall be made in writing to the clerk of said city setting forth:

(a) Name, residence, post office address, and the exact location of the dairy.

(b) The number of cows from which milk and cream are produced for sale or delivery, or controlled by the applicant.

(c) If the applicant does not keep cows, the source or sources from which he obtains milk or cream for sale or delivery.

Rec. Page

General Ordinances, City of Madison.

896 (d) Said applicant shall also present written consent from each person from whom he obtains milk and cream, granting to the health department or its authorized representative free and open access to his premises for the purpose of making an inspection of the sanitary conditions of same.

(e) The application shall state whether pasteurized or unpasteurized products are to be sold.

(2) Upon receipt of such application, the health department shall cause to be made an inspection of the sanitary conditions of the place of business for which such application is made for license, and upon recommendation of the health department that the applicant has complied with all the provisions of sections 7.08 to 7.16, inclusive, and that it has made a thorough examination of the proposed dairy or place of business, and that in its judgment the proposed location and surroundings are in good sanitary condition, sufficient and proper in every way for conducting the proposed business in accordance with the terms of this chapter, and that all said animals are free from disease, and that in its judgment the applicant is a proper person to conduct a dairy, or to engage in the sale of milk and cream and milk products, and has complied with the terms of this chapter; and on the payment of one dollar, said clerk shall issue a license showing that the person, association, or corporation to whom the same is based has complied with this chapter and the rules and regulations adopted by and in connection or in pursuance of it, in the name of the applicant or dairy, or place of business.

Rec. Page

(3) Each license shall expire on the thirtieth day of June following the date of issue, unless sooner revoked as hereinafter provided.

7.10. *Grade of Milk Which May Be Sold.* No milk or cream except "Madison Grade A" raw milk or cream as defined in section 7.14, pasteurized milk or cream as defined in section 7.15, or certified milk or cream as defined in section 7.16 hereof, shall be sold in the City of Madison.

Public Health.

7.11. *Sanitary Conditions Governing the Production of Milk in General.* Milk produced in violation of the following regulations shall be deemed adulterated.

(1) All water for washing and cleansing utensils, containers, or apparatus used in the preparation of milk for sale shall be clean and wholesome. No water other than that from a public supply shall be used in the City of Madison without a permit therefore issued by the health department.

(2) A clean, sanitary, properly constructed milk house, conveniently located, shall be provided. The inspector shall refuse approval for the construction of new milk houses having a direct connection with the stable, or located within fifteen feet of any water closet, privy vault, cess pool, or horse or cow stable, or located in a cellar or basement, nor shall he accept for approval any producer of milk not already approved whose milk houses are in connection with the stable, or located less than fifteen feet from any water closet, privy vault, cess pool, cow or

Rec.
Page

horse stable, or located in a cellar or basement. Such
897 milk houses shall be kept at all times absolutely clean and sanitary, and no articles not necessary for the care and handling of milk shall be kept in such milk house. Beginning the first of May and up to the first of November, all windows and doors of such milk houses must be provided with tight screens in good repair. The milk house shall not be used for any other purpose than the cooling and straining, bottling and storing of milk. It shall be equipped with proper apparatus for the thorough sterilizing of bottles, cans and utensils. It shall have no direct connection with the kitchen, stable, or any building which may be in any unsanitary condition. It shall be properly lighted, ventilated, and drained. The floors must be constructed of concrete or material equally as good, and the walls and ceilings shall be free from dust and cob-webs, and shall be white-washed or painted, preferably white-washed, at least once each year, and oftener if deemed necessary by the milk inspector. The floor shall be free from cracks and crevices, and the milk house shall be free from flies and vermin at all times.

(3) Where used, the bottling machine filler shall be constructed so that it can be readily taken apart and cleansed, especially the springs and plunges. It shall be cleansed thoroughly after each use, and when not in use shall be kept covered with a clean cloth or glass case.

(4) A convenient and adequate supply of water must be provided for washing utensils and cooling the milk, and an adequate method of sterilization

Rec.
Page

of bottles, strainers, pails, cans, and apparatus used in handling and bottling of milk must be available.

(5) Milk shall at no time be exposed to dust, dirt, or other contamination, and milk must at all times be handled in a cleanly manner.

(6) No hay or other dry feed shall be offered to the cows during the milking time, or immediately prior thereto, and no milk shall be used from diseased cows, nor milk that has been polluted with fecal material.

(7) As soon as it is drawn, all milk must be removed immediately to the milk house and strained, and cooled to fifty degrees Fahrenheit, and must be maintained at that temperature until delivered.

(8) Cows and horses must not be housed in the same stables unless separated by a properly constructed partition, sufficient to exclude all odors and by an efficient and air-tight door. The cow stables may be used for no other purpose than for the stabling of the herd, and shall be kept clean at all times. Manure shall be removed from the stable daily, to a distance of at least fifty feet from the stable, and the floors must be dry and tight and have a good drain, and be provided with a suitable gutter. The walls and ceilings must be kept free from dust and cobwebs, and must be whitewashed or painted at least once a year, or oftener if deemed necessary by the milk inspector. Stables must be well lighted and ventilated, and separate stables must be provided for sick cows.

(9) No license shall be issued until all cows of the applicant have been examined and tested for tuber-

Rec.
Page

culosis by the tuberculin test, and found free from tuberculosis, and the milk or cream of no cows or cow shall be sold or offered for sale, which milk or cream shall become the property of any licensed person until such cow or cows have been tested for tuberculosis by the tuberculin test at the expense of the applicant, by some competent person approved by the city health officer or by the state veterinarian, or by the State Live Stock Sanitary Board, and the tuberculosis certificate filed with the health department, which certificate shall give an accurate description of the different cows, stating age, breed, and distinctive markings.

(10) The health officer of the City of Madison may require at any time a test or retest of any herd furnishing milk and cream in the City of Madison suspected of unsanitary or diseased condition, and shall require such a test at least every two years unless any test shall disclose tuberculosis in any member of the herd tested, in which case tests of such herds shall be made semi-annually thereafter so long as said facts shall disclose such tuberculosis.

(11) If after the issuance of the license any of the cows of any licensee be disposed of and replaced by others, or if additional cows be added to the number stipulated in the certificate of health hereinbefore mentioned, or if any change be made in the location of a dairy or the place of business, the owner must forthwith inform the board of health in writing of such change or increase in the number of cows. If after the issuance of the license there are introduced into the herd any new cows, or any which

Rec.
Page

have not been examined or tested as hereinbefore provided, no milk or cream shall be sold or disposed of from such herd in said city until said new cows have been examined and tested as herein provided. Whenever it shall be found that any milk-producing cow is affected with tuberculosis, or any other disease rendering the milk impure and unsanitary, no milk or cream from the cow or cows from the herd in which they are kept shall be sold or offered for sale in this city until such cow or cows have been removed, killed, or such disease cured.

(12) No milk, cream, or milk products, shall be sold, offered for sale held in possession with intent to sell or delivered within the City of Madison from any place or premises upon which or within which there exists a contagious disease, provided that after the premises upon which the contagious disease exists are properly quarantined, and that the persons engaged in the production, handling, transporting, sale, or delivery of milk shall take up their residence upon premises distinctly separate from the quarantined premises, and all utensils used in the production and preparation of the milk products are removed and kept removed from the quarantined premises, and that persons engaged in the production, transportation, handling, sale, or delivery of the milk in no manner come in contact with the patients on the quarantined premises, such milk, cream, or milk products may be sold in the City of Madison after they have been first pasteurized in accordance with the regulations of section 7.15 (1) hereof. No person affected with a contagious or communicable disease, or sus-

Rec. Page

pected of being affected with a contagious or communicable disease, or having ulcers or open sores shall in any manner engage in the handling of milk and
899 any persons suspected of being infected with a contagious or communicable disease shall submit to an examination for the purpose of determining the presence of such contagious or communicable disease upon order of the health officer.

(13) No person, firm, or corporation engaged in the sale of milk within the City of Madison shall have in his or its possession any milk, cream, or milk products, obtained from any source or sources not conforming in all respects to the provisions of sections 7.08 to 7.17 inclusive of these ordinances whether same shall be offered for sale within or without the City of Madison.

(14) All manure shall be removed from the cow barn daily to a distance of not less than fifty feet from the barn and the cow and barn yard shall at all times be maintained in a clean and sanitary condition.

(15) No milk shall be drawn from cows that are kept in barns or stables which are not reasonably well lighted and ventilated, or that are kept in barns or stables that are filthy from any accumulation of animal feces or excreta, or from any other cause. Milk which shall be drawn from cows which are themselves in a filthy condition, milk kept or transported in dirty, rusty, or open seamed cans or other utensils, milk that is stale, putrescent, or putrid, milk to which has been added any unclean or unwholesome foreign substance, and milk which has been kept exposed to

Rec.
Page

foul or noxious air or gases in barns occupied by animals, or kept exposed in dirty, foul, or unclean places or conditions, is hereby declared to be unsanitary milk, and its sale is hereby forbidden. Cream produced from any such aforesaid unsanitary milk, cream produced by the use of a cream separator which separator had not been thoroughly washed, cleansed, and scalded after previous use in the separation of cream from milk, cream produced by the use of a cream separator placed or stationed in any unclean or filthy room or place, or in any building containing a stable wherein are kept cattle or other animals, unless such cream separator is so separated and shielded by a partition from the stable portion of such building as to be free from all foul and noxious air or gases which issue or may issue from such place or stable, cream that is stale, putrescent, or putrid, cream that is kept or transported in dirty, rusty, or open seamed cans or other utensils, and cream which has been kept exposed to foul or noxious air or gases in barns occupied by animals, or in dirty, foul, or unclean places or conditions, is hereby declared to be unsanitary cream, and its sale is hereby forbidden.

(16) Immediately before milking, the udders shall be carefully wiped with a clean white cloth, and the milking shall be done with dry hands.

(17) In case milking machines are used, the parts of the machine shall be kept at all times in a clean and sanita condition. All parts of the milking machine and appurtenances of same with which milk in any way comes in contact shall be thoroughly

Rec. Page

cleaned and sterilized immediately after milking is completed, and milk produced through the aid of, or through the instrumentality of a milking machine
900 all parts of which are not at all times clean, free from filth or offensive odors, is declared unsanitary milk and its sale in the City of Madison is prohibited.

(18) All premises upon which milk is produced shall be kept at all times in clean, sanitary condition in every respect, and free from disease, and subject to inspection at any time by the health department.

7.12. *Regulations Concerning Transportation and Delivery of Milk and Cream.*

(1) All milk and cream while being transported from the place where it is produced or stored, whether to the place of sale or storage, or for delivery, shall be securely protected from flies, filth, dirt, and dust. If transported on trucks not provided with permanent coverings, such milk or cream shall be covered by clean canvas.

(2) No milk bottles or milk containers shall be left at any premises that are quarantined because of a communicable disease. The householder shall provide a suitable receptacle into which the milk shall be emptied, and the original receptacle returned to the wagon.

(3) Milk when being delivered shall not have a temperature above fifty-five degrees Fahrenheit.

(4) No milk or cream shall be changed either in whole or in part from one container to another upon the streets or in the milk wagons, or at any other place besides the dairy or milk house, provided that

Rec.
Page

this regulation shall not apply to milk emptied at houses in quarantine, in accordance with subsection (2) hereof.

(5) The interior of all milk wagons must be kept in a clean and sanitary condition at all times, and all containers for the storage of bottles or other receptacles for containing milk or cream must be maintained in clean condition, and free from odors.

(6) Milk wagons, trucks or other vehicles, used for the transportation and sale of milk and milk products shall be used exclusively for this purpose unless permission otherwise has been given by the health department.

(7) No person shall send, ship, return, deliver, or cause to be sent, shipped, returned, or delivered to any producer, wholesaler, or retailer, of milk and cream, any cans, bottles, or other vessels used as containers for milk or cream containing any article or substance other than milk or its products.

(8) All bottles, cans, or other containers of milk or cream shall be cleaned and returned within seventy-two hours.

(9) Milk, cream, or milk products stored, retained, transported or delivered in any vehicle bearing a descriptive designation of the kind, quality, or source of the kind, quality, or source of any milk, cream, or milk products shall correspond in all respects with such descriptive designations appearing on such vehicle.

901 7.13. *Regulations Governing the Sale of Milk.*

(1) All bottles containing milk or cream for sale or delivery within the limits of the city shall be

Rec.
Page

tightly closed with caps plainly marked with the name and address of the person, firm, or corporation distributing such milk. If such milk or cream has not been pasteurized, such caps shall also have plainly printed the words "raw milk" or "unpasteurized milk". In the case of pasteurized milk or cream, such caps shall have the words "pasteurized milk" or "pasteurized cream" plainly printed thereon, but shall not contain the phrase or words "grade A", unless the milk or cream is produced and handled in conformity with the rules and regulations of the milk ordinances of the City of Madison relating and pertaining to "grade A" raw milk and cream production before pasteurization. If there be a name blown into the bottle, or label attached to the bottle, such name shall not differ from the name of person, firm, or corporation indicated on the cap of the bottle.

902 (2) Cans or containers, other than bottles used for vending or delivering milk or cream, shall have securely fixed tags giving the same information with regard to the contents of such containers as that required to be shown on the caps of bottles, and all cans or containers used for the vending of milk or cream shall have attached thereto tags conforming to the provisions of the statutes of Wisconsin or the rules of the Wisconsin Dairy and Food Commission regulating such sale and labeling.

(3) Milk and cream shall be deemed misbranded within the meaning of this section when the package, can, bottle, or other container containing same, or any cap, label, or tag attached thereto shall bear any

Rec. Page

statement, mark, design, or device regarding milk or cream or milk products so contained in such package, can, bottle, or other container, which is false or misleading in any particular, or when any milk, cream, or milk products shall be falsely branded or labeled, or if false statements are made concerning same as to the place where, or the breed, or the character of the cows from which, or the person by whom such milk or cream was produced, obtained, handled, or supplied.

(4) No person, association, or corporation producing milk or cream or obtaining milk or cream from others shall sell or offer same for sale unless it meets the following standards:

(a) Milk containing less than three per centum of milk fat, or milk containing less than eight and one-half per centum of milk solids, not fat, or milk drawn from cows within eight days before or four days after parturition, or milk which has been diluted with water or any other fluid, or milk to which has been introduced any coloring matter or chemical, or preservative or deleterious or filthy substance, or any foreign substance whatsoever, or milk drawn from any sick or diseased cow or cows, having ulcers or other running sores, or milk drawn from cows fed unwholesome food, or milk in any stage of putrefaction, shall be defined as adulterated milk.

(b) The term adulterated cream shall mean cream containing less than eighteen percentum of milk fat, or cream taken from cows within eight days before or after parturition, or cream from milk to which has been added or introduced any chemical matter or

Rec.
Page

coloring, or preservative, or deleterious or filthy matter, or any foreign substance whatsoever, or cream
903 from milk drawn from cows kept in a filthy or unhealthy condition or cream from milk drawn from any sick or diseased cow, or cows having ulcers or running sores, or cream from milk drawn from cows fed unwholesome food, or cream to which has been added or introduced any colored matter, or chemical or preservative, or deleterious or filthy substance, or any foreign substance whatsoever, or cream in any stage of putrefaction; provided that nothing in this act shall be construed as prohibiting the sale of milk commonly known as "skimmed milk" when the same is sold for and as skimmed milk.

(c) Cream sold or offered for sale in the City of Madison as "extra cream," "heavy cream," "whipping cream," "XXX cream," or any other designation indicating that such cream is of a superior quality, shall contain not less than twenty-eight percentum of butter fat.

(5) Milk kept for sale in any shop, restaurant, market, bakery, or other establishment, shall be stored in a covered cooler box, or refrigerator. No vessel containing milk for sale shall be allowed to stand outside of said cooler box or refrigerator except while a sale of said milk is being made. Every such cooler box or refrigerator shall be properly drained, cleansed, and cared for, and shall be kept tightly closed except during such intervals as are necessary for the introduction of milk or ice, and shall be kept only in such locations as shall be approved by the board of health.

(6) All places having a dealer's license, or using

Rec. Page

milk which they may have received in bottles, cans, and other containers after the contents of such bottles, cans, or other containers shall have been emptied shall be securely protected from flies, filth, and other contamination, and if stored outside of building or buildings shall be stored in cases, bottles, cans and other receptacles inverted and elevated at least twenty-four inches above the ground.

(7) It shall be unlawful for any firm, corporation, association, or person operating any store, meat market, delicatessen, booth, or stand, to sell, offer for sale, have in their possession with intent to sell any milk, cream, or milk products, whether to be consumed on the premises as a beverage, or to be removed from the premises, without having first obtained a vender's license.

(a) License must show name, residence, and exact location of the place of business where said applicant proposes to sell milk.

(b) The name of person, or persons, corporation, or association from who said milk, cream or milk products are obtained for sale.

(c) The approximate number of quarts sold daily of said milk, cream, or milk products.

(8) Upon inspection of the premises by the health department and the certificate to the city clerk in writing that said premises upon which it is proposed to sell milk are equipped to handle such milk, cream or milk products in a clean and sanitary way, and in compliance with sections 7.08 to 7.17 inclusive, and that said applicant is a proper person to sell milk,
904 cream or other milk products, the city clerk, upon

Rec.
Page

payment of one dollar shall cause to be issued a license in the name of the applicant, and the location of the place of business, such license to expire on the thirtieth day of June following the date of issue of the same, unless otherwise revoked as hereinafter provided. Such license shall not be transferable.

(9) No person, corporation, association, or firm shall sell or offer for sale, or have in his or its possession with intent to sell or deliver any milk, cream, or milk products to any firm, person, association, or corporation within the City of Madison to be used with other food products or in the preparation or manufacture of food products for man until such person, firm, association or corporation shall have secured a license in accordance with sections 7.09 to 7.17 hereof, inclusive.

(10) No person, persons, corporation, firm or association shall serve any milk to be consumed on the premises where served unless such milk is contained in individual sealed receptacles containing only the quantity of milk intended for the person served. Milk or cream used as a flavoring for food or drink may be transferred into containers when taken from packages as provided.

(11) No store, shop, restaurant, hotel, delicatessen, hospital, or sanitorium, boarding-house, public institution or other place selling, offering for sale, having in its possession for the purpose of sale or delivery or consumption upon the premises shall have in its possession any milk, cream, or milk products not produced or distributed by some person, firm, association, or corporation licensed according to the provisions of this chapter.

Rec.
Page

7.14. *Madison Grade A Raw Milk.* "Madison Grade A" raw milk is milk the average bacterial count of which does not exceed fifty-thousand bacteria per cubic centimeter, and which is produced upon dairy farms located within a radius of ten miles from the Central portion of the City of Madison otherwise known as Capitol Square, and conforming with the following rules and regulations:

905 (1) Tests of Cows. A physical examination and tuberculin test of all cows shall be made before any milk therefrom is sold and at least once every twelve months thereafter by a veterinarian approved by the Madison Board of Health and said test shall be made, and reactors disposed of, in accordance with the current requirements approved by the United States Bureau of Animal Husbandry for accredited herds, or as prescribed by the State Livestock Sanitary Board.

A certificate signed by the veterinarian and filed with the board of health shall be the only valid evidence of the above test. Every diseased animal shall be removed from the herd at once and no milk from diseased cows shall be offered for sale. All reacting animals shall be isolated at once and immediately excluded from the premises. All animals failing to pass the tuberculin test shall be branded with the letters "T" or "TB" on the shoulder, hip or jaw, and removed at once and slaughtered under the direction of the Madison Board of Health, or disposed of as prescribed by the State Livestock Sanitary Board. Each letter in the brand shall not be less than two inches high and one and one-half inches wide.

906 (2) Dairy Barns.

Rec.
Page

(a) Lighting. Such sections of all dairy barns where cows are kept or milked shall have at least three square feet of window space for each cow.

(b) Air Space. Such sections of all dairy barns where cows are kept or milked shall have at least five hundred cubic feet of air space per stanchion.

(c) Floors. The floors and gutters of such parts of all dairy barns in which cows are milked shall be constructed of concrete or other impervious and easily cleaned material approved by the Madison Board of Health and shall be graded to drain properly, and shall be kept clean and in good repair. No pigs, fowls, horses, etc., shall be permitted in barns used for dairy purposes.

(d) Walls and Ceiling. The walls and ceilings of all dairy barns shall be finished in a manner approved by the Madison Board of Health and shall be whitewashed once each year or painted every two years and shall be kept clean and in good repair. In case there is a second story above that part of the barn in which cows are milked, the ceiling shall be tight.

(e) Cow Yard. All cow yards shall be graded and drained and kept clean.

(f) Manure Disposal. All manure shall be removed and stored or disposed of in such manner as best to prevent the breeding of flies therein.

(3) Milk House or Room. (a) Construction. There shall be provided a separate milk house or milk room for the handling and storage of milk and the washing and sterilizing of milk apparatus and utensils, provided with a tight floor constructed of concrete or other impervious material and graded to provide

Rec.
Page

proper drainage. The walls and ceiling of the milk house or room shall be of such construction as to permit easy cleaning and shall be finished in a manner approved by the Madison Board of Health. The milk house or room shall be well lighted and ventilated and all openings effectively screened to prevent the entrance of flies, and shall be used for no other purpose than the handling and storage of milk or milk products and other operations incident thereto. The cleaning and other operations shall be so located and conducted as to prevent any contamination one to the other. The milk room shall not open directly into the barn or into any room used for sleeping or domestic purposes.

(b) Cleanliness. The floors, walls, ceilings, and equipment of the milk house or room shall be kept clean at all times. All means necessary for the elimination of flies shall be used.

(4) Sanitary Toilet. Every dairy farm shall be provided with a sanitary toilet located, constructed and operated in accordance with the regulations of the Madison Board of Health.

(5) Water Supply. The water supply shall be easily accessible adequate, and of a safe, sanitary quality.

907 (6) Utensils. (a) Construction. All containers or utensils, used in the handling and storage of milk or milk products must be made of non-absorbent material, and of such construction as to be easily cleaned and must be in good repair. Joints and seams should be soldered flush and smooth. All milk pails shall be of a narrow mouth design approved by the Madison Board of Health.

Rec.
Page

(b) Strainers. No milk of these grades shall be strained or handled with any equipment that is not accessible and easily cleaned; wire mesh strainers are prohibited.

(c) Cleaning. All containers and other utensils used in the handling, storage, or transportation of milk and milk products must be thoroughly cleaned after each usage.

(d) Sterilization. All containers and other utensils used in the handling, storage, or transportation of milk or milk products shall be sterilized with steam or chlorine in a manner approved by the Board of Health.

(e) Storage. All containers and other utensils used in the handling, storage or transportation of milk and milk products shall be stored so as not to become contaminated before again being used.

(f) Handling. After sterilization no container or other milk or milk product utensil shall be handled in such manner as to permit any part of the person or clothing to come in contact with any surface with which milk or milk products come in contact.

(7) Milking. (a) Udder and Teats. The udder and teats of all milking cows shall immediately prior to milking be washed with a disinfectant solution and dried with a clean cloth. The disinfectant solution shall be approved by the Madison Board of Health.

(b) Flanks. The flanks of all milking cows shall be kept free from visible dirt at the time of milking.

(c) Milker's Hands. Milker's hands shall be clean, rinsed with a disinfectant or washed with soap and water, and dried with a clean towel immediately

Rec. Page

before milking. Should the milking operation be interrupted, the milker's hands must be washed with soap and water before milking is resumed. Wet hand milking is prohibited. Convenient facilities shall be provided for the washing of milker's hands.

(d) Clean Clothing. Milkers and milk handlers shall wear clean outer garments while milking.

(e) Milk Stools. Milk stools shall be kept clean and stored in a clean place.

(f) Removal of Milk. Milk shall be removed promptly from the barn to the milk house or straining room. No milk shall be strained in the dairy barn.

(g) Cooling. Milk must be cooled within one hour after milking, to fifty-five degrees Fahrenheit or less and maintained at or below that temperature until delivery.

908 (8) Bottling and Capping. Capping shall be done by machine. Caps shall be purchased in sanitary tubes and kept therein in a clean place until used. Bottling shall be done at the place of production.

(9) Health Certificates. Every person connected with a dairy or milk plant whose work brings him in contact with the production, handling, storage, or transportation of milk or milk products shall have within six months passed a medical examination by a licensed physician and the health certificates from such examination filed with the Madison Health Department. The examination shall include a nasal and throat culture together with an examination of the feces and urine by the State Laboratory of Hygiene. It is expected that all new employees shall file a health certificate within forty-eight hours after he commences work.

Rec.
Page

Notice of disease shall be sent to the health officer immediately by any milk producer or distributor upon whose dairy farm any case of sickness or any infectious, contagious, or communicable disease occurs.

(10) Madison "Grade A" Raw Cream. Milk from which "Madison Grade A" raw cream is obtained must meet all of the requirements of Madison Grade A raw milk. The cream must be separated by centrifugal force and shall not contain less than eighteen per cent butter fat, and at no time shall the bacterial count exceed more than five times that allowed for Grade A milk, and such cream must conform to all the requirements for Madison Grade A milk.

(11) Labels. All bottles, cans, packages and other containers enclosing Grade A milk shall be plainly labeled or capped to display the name and grade of the contents, namely, Grade A raw milk or Grade A raw cream.

(12) Bacterial Count. The bacterial count of Grade A raw milk and Grade A raw cream means a bacterial count as determined in conformity with the standard methods of the American Public Health Association. The average bacterial count of Grade A raw milk and Grade A raw cream shall be taken to mean the average of the bacterial count taken by the logarithmetic table, or four out of five samples showing a count within the bacterial limitations specified for the grade, over such a period of time as the Madison Board of Health deems necessary to establish a grade but in no case is such period of time to exceed six months.

7.15. Pasteurization of Milk. (1) It shall be unlaw-

Rec.
Page

ful for any person, association or corporation to sell, offer for sale or have in his or its possession with intent to sell or deliver in the City of Madison, any milk, cream or milk products as pasteurized unless the same shall have been pasteurized and bottled in the manner hereinafter provided within a radius of five miles from the central portion of the City of Madison, otherwise known as the Capitol Square, at a plant the machinery, equipment and facilities of which shall have been approved by the Health Department.

909 (2) Pasteurization of milk, cream, or milk products, as the term is used in section 7.08 to 7.17 inclusive, hereof shall mean the heating of milk to a temperature of not less than one hundred forty-two degrees Fahrenheit, and maintaining the same temperature for not less than thirty minutes by means of equipment and machinery approved by the health department. The time of heating shall be calculated from the time that the entire quantity of the product reaches the required temperature. Milk, cream, or milk products, after pasteurization shall be cooled immediately to a temperature of fifty degrees Fahrenheit or less, and maintained at that temperature until distributed. Following the heating and cooling, the pasteurized products shall not be exposed to air, flies, filth, or other contamination. Provided, however, that anything contained herein shall not be construed as prohibiting any other process which has been demonstrated as of at least equal efficiency and approved by the Board of Health of the City of Madison.

910 (3) No milk, cream, or milk products shall be kept,

Rec.
Page

sold, or kept for the purpose of sale or distribution that have been treated by any method of heating or pasteurizing except such milk, cream, or milk products as have been pasteurized in accordance with subdivisions (1) and (2) of this section, and all such milk, cream, or milk products treated by any process shall be distinctly labeled "pasteurized" as provided in section 7.13 (1). No license for the pasteurizing of milk, cream, or milk products shall be issued to any person, firm, association or corporation until the type of machinery, equipment, and facilities for pasteurizing and handling such milk shall have been approved by the health department.

(4) A recording apparatus shall be installed upon the pasteurizer to record during operation the temperature of the pasteurized product as it flows from the heater. The thermometer on this recording apparatus must be accurate and be kept submerged in the milk in such a way that it is not exposed to escaping steam or other heat except the heated product. The records made from this thermometer must be accurate, and on Monday of each week must be transmitted to the health department. It is further provided that, if in the judgment of the health department or the dairy and food inspector it shall be deemed necessary, such recording apparatus shall be sealed in such a manner as to securely prevent interfering or tampering with said recording thermometer, and such seal shall be broken only by properly authorized representatives of the health department, and the necessary expense of such seals and charts shall be borne by the licensee and all thermometric

Rec.
Page

apparatus shall be approved by the health department.

(5) All pasteurizing apparatus shall be cleaned each time upon the completion of pasteurization, and shall be sterilized immediately before the pasteurization process is begun.

(6) All persons engaged in the pasteurizing of milk, cream, or milk products shall wear clean outer garments.

(7) No milk, cream, or milk products shall be pasteurized or repasteurized for sale as milk or cream more than once.

911 (8) Every person, firm, corporation, individual and association selling or offering for sale or distribution pasteurized milk within the City of Madison, whether the pasteurizing plant is located within or without the City of Madison, shall in writing grant to the health department through its authorized representative free access to the plant and all parts of its machinery and equipment at any reasonable time, whether said plant is being operated or not, for the purpose of inspecting the equipment, process of pasteurization, or methods of distribution and handling of such milk, cream, or milk products, and such permission is a continuing condition of said license.

(9) Pasteurized milk or cream shall not be held, kept, or offered for sale in bottles unless such milk or cream has been bottled at the place of pasteurization.

7.16. Certified Milk. No milk or cream shall be sold as certified milk or cream unless such milk or cream conforms to all the terms of sections 7.09 to 7.17 inclusive, and in addition thereto shall have received

Rec.
Page

an official certification by a medical milk commission organized in accordance with the rules and provisions of the American Association of Milk Commissioners, and such certification shall have received the approval of the Madison Health Department.

7.17. General Provisions Pertaining to Milk Regulations, and the Enforcement Thereof.

(1) The health department or any inspector designated by the health department shall have the right to enter any building, wagon or place where milk or cream is kept or exposed for sale within the limits of the City of Madison to ascertain whether or not the owner or occupant is complying with Section 7.08 to 7.17 inclusive, and shall have the right to take samples of milk or cream not to exceed one pint from any can, vessel, or bottle, for the purpose of inspecting, testing, analyzing, or for microscopic examination.

(2) Whenever a sample or samples so taken shall not correspond with or shall be in violation of the requirements of sections 7.08 to 7.17 hereof, inclusive, such person, persons, corporation, or companies in whose possession, care, custody, or control such milk or cream shall be found shall be deemed guilty of a misdemeanor and punished as hereinafter provided. Any person, association, or corporation that shall not permit such examination by said board of health by their representative shall forthwith forfeit his, her, or their license or licenses, and shall be punished as hereinafter provided.

(3) All milk, cream, or milk products sold or offered for sale for consumption upon the premises as a bev-

Re:
Page

erage shall be delivered to the patron or customer in the original bottle bearing a cap labeled according to the provision of this chapter and it shall be unlawful to offer for sale for beverage purposes so-called bulk milk or tank milk, or milk transferred from the original container in any manner.

912 (4) In case of difficulty in determining the character of the milk sold, a chemical and bacteriological examination may be secured and the sale of milk which does not conform to the following standards shall be prohibited, to-wit:

Bacteriological analysis: Milk, 500,000 bacteria or less per cubic centimeter; Cream, 800,000 bacteria or less per cubic centimeter.

(5) Compliance with all conditions and provisions of section 7.08 to 7.17 inclusive shall be a continuing condition upon the validity of any license issued under the provisions of said sections, and upon complaint in writing by any resident of the City of Madison, or by any representative of the health department or sanitary inspector, and filing the same with the board of health, that such licensee sold or offered for sale milk or cream that is impure, unhealthy, or unsanitary, or that the dairy or place in which said cows are kept is filthy or unhealthy, or that the milk sold by such person was drawn from cows that are affected with tuberculosis or other disease rendering the milk unhealthy or unsanitary, or that said licensee is violating any of the provisions of sections 7.09 to 7.17 hereof, inclusive, or rules of the board of health, the board of health shall cause an examination to be made of the premises and animals

Rec.
Page

and of such milk or cream, and if conditions warrant, the board shall summon such person or persons to appear before it within three days after the date of service of such summons to show cause why his or their license or licenses shall not be revoked. The board of health shall proceed to hear such matters, and if in its discretion the allegations of the said complaint are true and sufficient, it shall revoke the license or licenses of such person or persons complained of.

(6) No tickets shall be used in connection with the sale and delivery of milk more than once, and no tickets shall be used or accepted for use from any premises in which any contagious or communicable disease exists.

(8) The board of health shall from time to time make such further rules and regulations in accordance with section 141.01 of the Revised Statutes of 1929, respecting the sanitary conditions of stables, shed, buildings in which cows are kept, manner of handling same, buildings, containers, bottles, and cans in which milk or cream is held, and such other regulations pertaining to the sale and distribution of milk, cream, or milk products in the City of Madison as the said board may deem proper. All such rules and regulations shall become effective after publication in the official city paper.

(9) When in its opinion the public health requires action, the health department may require that any milk or cream supply shall be pasteurized under the supervision of said department or its officers, such
913 milk or cream to be sold only as a pasteurized sup-

ply until such time as the department decides that the necessity for such pasteurization no longer exists.

(10) If and when an emergency shall develop that milk or cream conforming to the terms of sections 7.08 to 7.17 hereof, inclusive, shall not be available or shall be difficult to secure in sufficient quantity to meet the needs of the City of Madison, any distributor of milk shall be authorized to procure other milk. Before distributing such other milk or cream it shall be pasteurized in accordance with section 7.15 (2). The source or sources from which such milk has been obtained shall be certified by the distributor to the health department and shall not be distributed unless and until the approval of the health department for the distribution of such milk shall have been obtained. Such distribution of milk from such sources shall continue only during such period as shall be approved by the health department.

7.18. Penalty for Violation of Sections 7.08 to 7.17 Inclusive. Any person violating any provision of sections 7.08 to 7.17 inclusive shall be deemed guilty of a misdemeanor, and shall upon conviction be punished by a fine of not less than five dollars nor more than fifty dollars for each offense, or by the cancellation of the license as hereinbefore provided, or by such fine and cancellation of license. Any violation of a regulation of the board of health of the City of Madison with relation to the production, transportation, sale, or delivery of milk passed pursuant to authority vested in said board by the statutes of the State of Wisconsin and ordinances of the City of Madison, shall be deemed a violation of sections 7.08 to 7.17 hereof, inclusive.

Rec.
Page

EHXIBIT 45.

AN ORDINANCE.

By the Committee of the Whole:

The City Council of the City of Madison do ordain as follows:

An ordinance to create sections 7.09 to 7.27, inclusive, of the General Ordinances of the City of Madison regulating the production and sale of milk and milk products within and for the City of Madison and repealing existing ordinances in conflict therewith. The City Council of the City of Madison do ordain as follows:

1. Section 7.09 to 7.27, inclusive, of the General Ordinances of the City of Madison regulating the production and sale of milk and milk products in and for the City of Madison are created to read as follows:

"7.09. *Production and Sale of Milk and Milk Products.*

Definitions. The following definitions shall apply in the interpretation and enforcement of the ordinances of the City of Madison relating to the production and sale of milk, cream and milk products in and for the City of Madison, being sections 7.09 to 7.27, inclusive, of this chapter and any amendments or additions thereto:

(1) *Milk.* Milk is hereby defined to be the lacteal secretion obtained by the complete milking of one or more healthy cows, excluding that obtained within fifteen (15) days before and five (5) days after calving, or such longer period as may be necessary to render the milk practically colostrum free, which

Rec.
Page

contains not less than eight and one-half per cent (8.50%) of milk solids not fat, and not less than three per cent (3%) of milk fat.

918 (2) *Milk Fat or Butter Fat.* Milk fat or butter fat is the fat of milk.

(3) *Coffee Cream, Whipping Cream, Sour Cream, Half and Half.*

(a) Coffee cream is a portion of milk which contains not less than eighteen per cent (18%) milk fat.

(b) Whipping cream, sometimes designated as extra heavy cream, or XXX cream, is a portion of milk which contains not less than twenty-eight per cent (28%) milk fat.

(c) Sour cream or salad cream is a portion of milk which contains not less than eighteen per cent (18%) milk fat. The acidity shall be more than (0.20%) expressed as lactic acid.

(d) Half and half, is commonly known as a mixture of cream and milk or skim milk, and shall contain not less than twelve per cent (12%) of milk fat. The fat content shall be stated on the label. This product may be homogenized.

(e) With the exception of ice cream, any cream or milk or mixture of cream and milk and other ingredients processed or manufactured to be used for human consumption shall meet all the requirements of this ordinance.

(4) *Skimmed or Separated Milk.* Skimmed or separated milk is milk from which a sufficient portion of milk-fat has been removed to reduce its milk-fat percentage to less than three per cent (3%), and shall not contain less than eight and one-fourth per cent (8¼%) solids not fat.

Rec. Page

(5) *Chocolate Milk.* Chocolate milk or chocolate flavored milk is whole milk sweetened and flavored with chocolate or cocoa. It may contain added salt, milk solids not fat and stabilizers approved by the Department of Public Health, and shall contain not less than three per cent (3%) milk fat.

919 (6) *Chocolate Drink.* Chocolate drink, chocolate flavored drink, or chocolate dairy drink is skimmed milk, sweetened and flavored with chocolate or cocoa. It may contain added salt, milk solids not fat, and stabilizers approved by the Department of Public Health. The product shall be labelled "made with skim milk" or "made with separated milk," or otherwise indicate fat content.

(7) *Buttermilk.* Buttermilk is the product which remains when fat is removed from milk or cream in the process of churning butter. It contains not less than eight and one-fourth per cent (8.25%) of milk solids not fat. Buttermilk must be the product of milk which has been produced and pasteurized in accordance with this ordinance.

(8) *Cultured Buttermilk.* Cultured buttermilk is the product resulting from the souring or treatment by lactic acid culture or other recognized culture of milk or milk products. It contains not less than eight and one-fourth per cent (8.25%) of milk solids not fat, and shall be made from milk which has been produced and pasteurized in accordance with this ordinance.

(9) *Vitamin D Milk.* Vitamin D milk is pasteurized whole milk, the vitamin D content of which has been increased by a process approved by the Department

Rec.
Page

of Public Health. At least four hundred (400) U. S. P. units must be present in each quart unless otherwise specified by the Health Commissioner. The term "unit" as used in these regulations refers to the United States Pharmacopeia, latest available publication. Milk or milk products fortified with any other vitamin concentrate must have the written approval and permission of the Health Commissioner.
920 Such approval shall state the method and products concerned.

(10) *Goats Milk.* Goat milk is the lacteal secretion, free from colostrum, obtained by the complete milking of healthy goats, and shall comply with all the requirements of this ordinance. The word "cows" shall be interpreted to include goats. Goats milk must be pasteurized.

(11) *Homogenized Milk.* Homogenized milk is pasteurized whole milk which has been homogenized or permanently emulsified through the break-up of the fat globules by methods and equipment approved by the Department of Public Health. The fat globules shall be broken up and so blended with the other milk solids to the extent that after 48 hours storage no visible cream separation occurs and the fat percentage of the top 100 Milliliters of milk in a quart bottle or of proportionate volumes in containers of other sizes does not exceed the fat percentage of the remaining milk by more than 0.25 per cent. The milk fat content shall be not less than three per cent (3%). Homogenized milk or homogenized cream shall not be mixed with milk or cream which has not been homogenized for the purpose of sale as milk.

Rec.
Page

(12) *Milk Products.* Milk products shall be taken to mean and include cream, sour cream, homogenized milk, goat milk, Vitamin D milk, buttermilk, skimmed milk, cottage cheese, milk beverages, skimmed milk beverages, and any other products made by the addition of any substance to milk or any of these products and used for similar purposes and designated as milk products by the Health Commissioner. All milk products shall be pasteurized or made from milk,
921 cream, or skim milk each of which shall have been pasteurized.

(13) *Cottage Cheese.*

(a) Cottage cheese is the soft uncured cheese made from sweet pasteurized skim milk by the following procedure: Harmless lactic-acid-producing bacteria are added to skimmed milk and it is held until it becomes coagulated. Rennet may be used also if desired. The coagulated mass may be cut; it may be warmed; it may be stirred; it is then drained. The curd may be washed with water and further drained; it may be pressed, chilled, worked, seasoned with salt. Flavoring and other food may be added if accepted by the Health Commissioner. The finished cheese shall contain not more than eighty per cent (80%) of moisture.

(b) *Creamed Cottage Cheese.* Creamed cottage cheese is the soft uncured cheese prepared by mixing cottage cheese with pasteurized cream or a mixture of pasteurized cream and pasteurized milk or pasteurized skim milk, or both. Such cream or mixture is used in such quantity that the milk fat added thereby is not less than four per cent (4%) by weight

Rec.
Page

of the finished creamed cottage cheese. The finished creamed cottage cheese contains not more than eighty per cent (80%) of moisture.

(14) *Soft Curd Process.* A method or process of treating milk or its products as approved by the Department of Public Health, so that it has a curd tension of less than twenty (20) grams as determined by methods established in STANDARD METHODS, latest edition published by the American Public Health Association.

(15) *Pasteurization.* The term "pasteurization," "pasteurized," shall be defined as the process of heating every particle of milk or milk products to at least 143° F., and holding at such temperature for at least thirty (30) minutes, or to at least 160° F.,
922 and holding at such temperature for at least fifteen (15) seconds, in approved and properly operated high temperature short time pasteurizer equipment; provided that nothing contained in this definition shall be construed as disbarring any other process which has been demonstrated to be eqqually efficient, and is approved by the Department of Public Health.

(16) *Adulterated or Misbranded Milk, or Milk Products.* Any milk, or milk products not conforming to the requirements of the definition and sanitation requirements of this ordinance or any applicable Wisconsin law or to which any substance has been added or removed except as may be specifically permitted by the Department of Public Health, shall be deemed adulterated.

Rec.
Page

Any milk, or milk product which carries a label other than that approved by the Department of Public Health shall be deemed misbranded.

(a) Any person, firm or corporation licensed to sell milk or milk products within the city limits of Madison shall at the request of the Department of Public Health furnish a detailed written plan of manufacture of any product offered for sale.

(b) The Department of Public Health shall select samples as conditions may warrant and order them to be tested in a qualified laboratory for special analysis, such as special claims of vitamin content, digestibility claims, etc., at the licensee's expense.

(c) All plant records of quantities of milk or milk products purchased and disposed of, and control tests shall be available for inspection by an officer of the Department of Public Health. These records shall be for any previous six (6) months period.

(d) If at any time an officer of the Department of Public Health finds insufficient or inefficient equip-
923 ment or any irregularity in the approved process of manufacture of any milk or milk product such dealer shall be deemed guilty of violation of this ordinance.

(17) *Milk Producer and Dairy Farm.*

(a) A milk producer is any person who owns or controls or supervises one or more cows from which a part or all of the milk products is sold or offered for sale.

(b) A dairy farm is any place or premises where one or more cows are kept from which a part or all of the milk or milk products is sold or offered for sale.

Rec.
Page

(18) *Milk Distributor or Vendor.* A milk distributor or vendor is any person who offers for sale or sells to another any milk or milk products for human consumption as such.

(19) *Milk Plant or Dairy Plant.* A milk plant or dairy plant is any place, premises, or establishment where milk or milk products are collected, handled, processed, stored, bottled, pasteurized or otherwise prepared for distribution.

(20) *Department of Public Health and Health Commissioner.*

(a) The term Department of Public Health shall mean the Health authority of the City of Madison, Wisconsin.

(b) The term Health Commissioner shall mean the head of the Department of Public Health or his authorized representative.

(21) *Average Bacterial Plate Count, Direct Microscopic Count, Reduction Time and Cooling Temperature.*

Average bacterial plate count and average direct microscopic count shall be taken to mean the logarithmic average, and average reduction time and average cooling temperature shall be taken to mean the arith-
924 metic average, of the respective results of the last three consecutive samples, taken upon separate days.

(22) *Inspection.* The Health Commissioner may authorize such inspections as are necessary to enforce the provisions of this ordinance. In the case of dairy plants or receiving stations the inspection shall be at least monthly. In the case of dairy farms its shall be at least every six (6) months.

Rec.
Page

(23) *Person.* The word "person" as used in this ordinance shall mean person, firm, corporation, or association.

(24) *And/or.* Where the term "and/or" is used, "and" shall apply where possible; otherwise "or" shall apply.

(25) *Certified Milk.* Certified milk is milk which conforms to the requirements of the American Association of Medical Milk Commissions in force at the time of production.

(26) *Certified Milk Pasteurized.* Pasteurized certified milk is certified milk which has been pasteurized in a milk plant which meets the requirements of this ordinance.

7.10 *The Sale of Adulterated, Misbranded, Uninspected Milk or Milk Products Prohibited.*

No person shall, within the City of Madison or its Police jurisdiction, produce, sell, offer or expose for sale, or have in his possession with intent to sell, any milk or milk products, which is adulterated, misbranded or from a source which does not hold a producer permit and milk plant license in good standing and which has been issued by the Department of Public Health, of the City of Madison, Wisconsin.

925 7.11. *Permits.*

It shall be unlawful for any person to bring into or receive into the City of Madison, Wisconsin, or its police jurisdiction, for sale, or to sell, or offer for sale therein, or to have in storage where milk or milk products are sold or served, any milk or milk product as defined in this ordinance from a

Rec.
Page

source not possessing a permit from the Health Commissioner of the City of Madison, Wisconsin.

Only a person who complies with the requirements of this ordinance shall be entitled to receive and retain such a permit.

On the filing of an application for a permit with the Health Commissioner he shall cause the source of supply named therein to be inspected and shall cause all other necessary inspections and investigations to be made. The Health Department shall not be obligated to inspect and issue permits to farms located beyond twenty-five (25) miles from the central portion of the City of Madison, otherwise known as the Capital Square. If the source of supply named therein conforms to the standards of this ordinance a permit may be issued by the Department of Public Health and shall remain in effect unless revoked in accordance with the provisions of this or other ordinances of the City of Madison, or until there is a change in ownership or tenancy of the premises. This permit shall not be transferrable from person to person or from one premises to another, except by Health Department action. A permit and/or can number shall not be transferred from farm to farm within the calendar year.

Milk permits may be temporarily suspended by the Health Commissioner upon violation by the holder of any of the terms and conditions of this ordinance, or for interference with the Health Commissioner
926 in performing the duties prescribed by this ordinance or to be revoked after an opportunity for a hearing by the Health Commissioner upon willful, intentional,

Rec.
Page

continuous or repeated violations of the provisions of this ordinance.

7.12. *Labeling.* All bottles, cans, packages, and other containers enclosing milk or any milk product defined in this ordinance shall be plainly labeled or marked with (1) The name and address of the milk plant where contents were processed and bottled or packaged; (2) The name of the contents as given in the definitions in this ordinance; (3) The word "Pasteurized" only if the product has been pasteurized as defined in this ordinance; (4) In the case of Vitamin D Milk the designation "Vitamin D Milk," the source of or kind of Vitamin D, and the Vitamin D content; (5) All labels shall be worded in letters of a size, kind and color approved by the Health Commissioner and shall contain no marks or words which are misleading; (6) In the case of cans or raw milk for pasteurization the producer permit number shall appear on the shoulder of the cans. The numbers shall be approximately three (3) inches high and kept legible at all times.

7.13. *Inspection of Dairy Farms and Milk Plants.* Inspections shall be made in accordance with Section 7.09 (22). In case the Health Commissioner discovers the violation of any item of sanitation, he shall make a second inspection after a lapse of such time as he deems necessary for the defect to be remedied. If he deems the violation of a serious enough nature he may suspend the permit until corrections are made. A second inspection shall be used to determine compliance with this ordinance. Any violation of the same item of this ordinance on more than

Rec.
Page
927 two consecutive inspections shall call for immediate suspension of the permit. The inspection of a milk plant shall include any receiving station.

One copy of the inspection report shall be posted by the Health Commissioner in a conspicuous place upon an inside wall of one of the dairy farm or milk plant buildings, and said inspection report shall not be defaced or removed by any person except the Health Commissioner. Another copy of the inspection report shall be filed with the records of the Department of Public Health. The dairy farm "Field Man", employed by a milk plant, shall use an inspection report form approved by the Health Commissioner and a copy of each inspection report shall be forwarded to the Department of Public Health. The Dairy Field Man shall make every effort to correct violations of this ordinance but the dairy receiving room man or plant operator shall refuse to accept insanitary milk as defined in this ordinance.

7.14 *The Examination of Milk and Milk Products.*

During each 30 day period, or more often if necessary, samples of milk and cream from each dairy and each milk plant shall be taken and examined by the Health Commissioner. Samples of other milk products may be taken and examined by the Health Commissioner as often as he deems necessary. Approval or disapproval of dairy plant milk, should be given only on milk obtained from the plant or their delivery trucks or delivery outlets owned by the same organization. Samples of milk and milk products from store, cafes, soda fountains, restaurants, and other places where milk or milk products are sold shall be

Rec.
Page

examined as often as the Health Commissioner may require. Bacterial plate counts and/or direct micro-
928 scopic counts shall be made in conformity with the latest standard methods recommended by the American Public Health Association. Examinations shall include such other determinations as the Health Commissioner may deem necessary for the detection of adulteration, these examinations to be made in accordance with the latest standard methods of the American Public Health Association and the Association of Official Agricultural Chemists. Samples may be taken by the Health Commissioner at any time prior to the final delivery of the milk or milk products. All proprietors of stores, cafes, restaurants, soda fountains, and other similar places shall furnish the Health Commissioner, upon his request, with the names of all distributors from whom their milk and milk products are obtained.

Whenever the logarithmic average bacterial count, the average reduction time, or the average cooling temperature of four (4) consecutive samples falls beyond the limits of this ordinance as determined in section 7.09 (21) and section 7.15 (1) (b), the permit shall be immediately suspended provided that notice has been given to the producer of the results of the first three (3) samples used in the average.

All samples for examination and analysis shall be furnished at the expense of the dairy plant.

7.15. *Certified Milk and Grade "A" Raw Milk for Pasteurization.*

(1) Definitions.

Rec.
Page

(a) Certified milk is milk which conforms with the requirements of the American Association of Medical Milk Commissions in force at the time of production and is produced under the supervision of a medical
929 milk commission and of the State Board of Health or of the City Health Commissioner of Madison.

(b) Grade "A" raw milk for pasteurization is milk the bacterial count of which, as determined under section 7.14, does not exceed a standard plate count of 200,000 per cubic centimeter or the average direct microscopic count of which does not exceed 200,000 per cubic centimeter by "clump count," or 800,000 per cubic centimeter if individual organisms are counted or the average reduction time of which is not less than six (6) hours; and which was produced on dairy farm conforming with all the following items of sanitation.

(2) *Examination of Cows for Tuberculosis and Other Diseases.*

(a) Except as provided hereinafter a tuberculin test of every animal in each herd and additions thereto shall be made before any milk therefrom is sold, and at least once every twelve (12) months thereafter, by a licensed veterinarian approved by the State livestock sanitary authority. Said tests shall be made and reactors disposed of in accordance with the requirements approved by the United States Department of Agriculture, Bureau of Animal Industry, for accredited herds. A certificate signed by the veterinarian and filed with the Health Commissioner shall be evidence of the above test: provided, that in modified accredited counties in which the modified accredited area plan is applied to the dairy herds,

Rec.
Page

the modified accredited area system approved by the United States Bureau of Animal Industry may be accepted in lieu of annual testing, providing acceptable official records are available to the Department of Public Health.

(b) *Bangs Disease.* Certified milk shall be from herds found to be free from Bang's disease and shall be retested every six (6) months by approved meth-
930 ods and by a qualified veterinarian. A certificate identifying each animal by number, and signed by the laboratory making the test and filed with the Health Commissioner, shall be required as evidence of the above test.

(c) *Diseased Udders, etc.* Cows which show an extensive or entire active induration of one or more quarters of the udder upon physical examination, whether secreting abnormal milk or not, shall be excluded from the milking herd, provided that this shall not apply in the case of a quarter that is completely dry. Cows giving bloody stringy milk or milk which is otherwise abnormal in composition as determined bacteriologically or chemically and/or with only slight induration of the udder shall be excluded from the herd until re-examination shows the milk has become normal.

For other diseases such tests and examination as the Health Commissioner may require shall be made at intervals and by methods prescribed by him, and any animals or reactors shall be disposed of as he may require.

(3) *Dairy Barn, Lighting.* A dairy or milking barn shall be required and in such section thereof where

Rec.
Page

cows are milked windows shall be provided and kept clean and so arranged as to insure adequate light properly distributed, and when necessary shall be provided with adequate supplementary artificial light. Three (3) square feet of window space per stanchion and box-stall shall be considered compliance in old construction. Four (4) square feet per stanchion shall be recommended for extensive remodeling or new construction.

(4) *Dairy Barn, Air Space and Ventilation.* Such sections of all dairy barns where cows are kept or milked shall be well ventilated to prevent condensa-
931 tion of moisture and accumulation of undue odor, and shall be so arranged as to avoid overcrowding.

(5) *Dairy Barn, Floors.* The floors and gutter of all such parts of all dairy barns in which cows are milked shall be constructed of concrete or other approved impervious and easily cleaned material, shall be graded to drain properly, and shall be kept clean and in good repair. No horses, calves, etc., shall be permitted in parts of the barn used for milking or through which milk is transported. Calves may be permitted in confined box stalls. Swine, sheep, goats and fowl must not be in the dairy barn at any time. All necessary means of fly control shall be used.

(6) *Dairy Barn, Walls and Ceilings.* The walls and ceiling of all dairy barns shall be whitewashed at least once each year or painted once every two (2) years, or oftener, if necessary, or finished in an approved manner, and shall be kept clean and in good repair. In case there is a second story above that

Rec.
Page

part of the barn in which cows are milked, the ceiling shall be tight. If the feed room adjoins the milking space, it shall be separated therefrom by a dust-tight partition and door. No feed shall be stored in the milking portion of the barn, unless kept in a tightly covered box.

(7) *Cowyard.* All cowyards shall be graded and drained and kept clean and free of mud holes. Swine shall not be allowed in the cow yard. Open sheds shall be kept clean and dry.

(8) *Manure Disposal.* All manure shall be removed from the dairy barn daily to a distance of at least fifty (50) feet from the barn and stored in such a manner as to be inaccessible to the cows and not create a hazardous or objectionable insanitary condition and must at all times be disposed of in such a manner as to best prevent breeding of flies therein.
932 During fly season all manure shall be spread in the field.

(9) *Milk House or Room, Construction.* There shall be provided a separate milk house or milk room in which the cooling, handling and storing of milk and milk products and the washing, bactericidal treatment and storage of milk containers and utensils shall be done.

(a) The milk house or room shall be provided with a floor constructed of concrete or other approved impervious material and shall be smooth, of good repair, properly drained and provided with an approved trap drain.

(b) It shall have walls and ceiling of such construction as to permit easy cleaning and shall be well

Rec.
Page

painted or finished in a manner approved by the Health Commissioner.

(c) It shall be well lighted and ventilated. The window area shall equal at least ten per cent (10%) of the floor area and there shall also be adequate artificial light.

(d) It shall have all openings effectively screened except outward-opening self-closing doors, unless other effective means are provided to prevent the entrance of flies. There shall be a ventilator extending from the ceiling through the roof. The ventilator flu shall be at least one hundred (100) square inches in area and shall be capped in such a manner as to prevent the entrance of flies and birds.

(e) It shall be used for no other purposes than those specified above, except as may be approved by the Health Commissioner.

(f) The milk house or room shall not be located in a cellar or basement or open directly into a stable or into any room used for domestic purposes or to any room or area likely to cause hazardous or obnoxious conditions. The milk house door shall be at least six (6) feet from the milking barn. In case the milk
933 house or room door leads to the milking barn through a hall or connecting room, outward swinging self-closing doors must be provided at each end of such hallway unless other effective means are provided to prevent the entrance of flies. The milk house preferably should be connected to the barn by a roofed-over areaway which is open on one or both sides.

(g) A milk house or room shall have water from an approved supply piped into it; shall be provided

Rec.
Page

with adequate facilities for the heating of water and for the cleaning of utensils; shall be equipped with two (2) compartment stationary wash and rinse vats and adequate metal racks for the storage of all dairy utensils.

(h) The milk house shall be equipped with facilities for heating in winter time.

(10) *Milk House or Room, Cleanliness and Flies.* The floors, walls, ceilings, and equipment of the milk house or rooms shall be kept clean at all times. All means necessary for the elimination of flies shall be used. All equipment or articles not used for production of milk shall be removed.

(11) *Toilet.* Every dairy farm shall be provided with one (1) or more sanitary toilets conveniently located and properly constructed, operated, and maintained, so that the waste is inaccessible to flies and rodents and does not pollute the surface soil or contaminate any water supply.

(12) *Water Supply.* The water supply for the milk room and dairy barn shall be properly located, constructed, and operated, and shall be easily accessible, adequate, and of a safe, sanitary quality and shall comply with the Wisconsin Well Code.

934 (13) *Utensils, Construction.* All multi-use containers or other utensils used in the production, handling, storage, or transportation of milk or milk products must be made of smooth non-absorbent material, and of such construction as to be easily cleaned, and must be in good repair. Joints and seams shall be soldered flush. Woven wire cloth shall not be used for strain-

Rec.
Page

ing milk. All milk pails shall be of a small-mouth design approved by the Health Commissioner. The manufacture, packing, transportation, and handling of single-service containers and container caps and covers shall be conducted in a sanitary manner.

(14) *Utensils, Cleaning.* All multi-use containers, equipment, and other utensils used in the production, handling, storage, or transportation of milk and milk products must be thoroughly cleaned after each usage in a manner approved by the Department of Public Health.

(15) *Utensils, Bactericidal Treatment.* All multi-use containers, equipment, and other utensils used in the production, handling, storage, or transportation of milk or milk products shall, prior to each usage, be subjected to an approved bactericidal process with steam, chlorine, hot water of 170° F. or any sanitizing agent approved by the Department of Public Health.

(16) *Utensils, Storage.* All containers and other utensils used in the production, handling, storage or transportation of milk or milk products shall be stored inverted on metal racks so as not to become contaminated before being used. Single service strainer discs of an approved design shall be used and stored in an approved and sanitary manner.

(17) *Utensils, Handling.* After bactericidal treatment no container or other milk or milk product utensil shall be handled in such manner as to permit
935 any part of any person or his clothing to come in contact with any surface with which milk or milk products come in contact.

Rec.
Page

(18) *Milking, Udders and Teats, Abnormal Milk.* The udders and tests of all milking cows shall be clean and washed with a bactericidal solution at the time of milking. Abnormal milk shall be kept out of the milk supply and shall be so handled and disposed of as to preclude the infection of the cows and the contamination of milk utensils.

(19) *Milking, Flanks.* The flanks, bellies, and tails of all milking cows shall be free from visible dirt at the time of milking. Flanks, bellies and tails shall be clipped except during pasturing months.

(20) *Milkers' Hands.* Milkers' hands shall be washed clean, rinsed with a bactericidal solution, and dried with a clean single service towel immediately before milking and following any interruption in the milking operation. Wet-hand milking is prohibited. Convenient facilities shall be provided for the washing of milkers' hands.

(21) *Clean Clothing.* Milkers and milk handlers shall wear clean outer garments while milking or handling milk, milk products, containers, utensils or equipment.

(22) *Milkstools.* Milk stools shall be impervious, washable and kept clean and when not in use shall be washed and hung above the floor.

(23) *Removal of Milk.* Milk shall be removed immediately to the milk house or straining room. Pouring, but not straining is permitted in the barn into containers provided with covers and so located as to protect the milk from contamination. Filled con-
936 tainers shall be removed immediately to the milk house for cooling.

Rec.
Page

(24) *Cooling.* Milk must be cooled immediately after completion of milking to 60° F. or less, and maintained at that temperature until delivered.

(25) *Miscellaneous.*

(a) All vehicles used for the transportation of milk or milk products shall be constructed with permanent tops and with permanent sides and backs and tight floors. Such openings as are necessary shall be fitted with tight-fitting doors. All vehicles shall be kept clean and used for no other purpose than the transportation of milk unless special permission is granted by the Health Commissioner. In the case of the individual producer delivering only his own milk, the Health Commissioner may grant permission for the use of a clean canvas as protection of the milk from the sun and other contamination.

(b) All milk cans shall be returned to the producer and shall be inverted on metal racks in the milk house by the milk hauler.

(c) The immediate surroundings of the dairy barn and milk house or room shall be kept in a neat, clean condition and free of all health nuisance.

(c) The immediate surroundings of the dairy barn and milk house or room shall be kept in a neat, clean condition and free of all health nuisance.

7.16. *Grade "A" Milk and Milk Plant Requirements.* Grade "A" pasteurized milk is milk produced in accordance with section 7.15 (1) (b), (2) to (24) inc. and which has been pasteurized, cooled, and bottled in a milk plant conforming with all of the following items of sanitation and the average bac-

Rec.
Page

terial plate count of which, at no time after pasteurization and until delivery, shall exceed 30 thousand (30,000) per milliliter as determined under section
937 7.09 (21) and section 7.14. The coliform count shall not exceed five (5) milliliter as determined under section 7.14. The allowable bacteria count as stated above for grade "A" pasteurized milk shall be applied to all milk or milk products as defined in this ordinance. The allowable bacteria count of thirty thousand (30,000) per milliliter shall not apply to buttermilk, cottage cheese and sour cream. The inspection of a milk plant shall also include receiving stations, and shall conform with the following items.

(1) *Floors.* The floors of all rooms in which milk or milk products are handled or stored or in which milk utensils are washed shall be constructed of tile, concrete or other equally impervious and easily cleaned material and shall be smooth, properly drained, provided with trapped drains and kept clean.

(2) *Walls and Ceilings.* Walls and ceilings of rooms in which milk or milk products are handled or stored or in which milk utensils are washed shall have smooth, washable, light-colored surface and shall be kept clean.

(3) *Doors and Windows.* Unless other effective means are provided to prevent the access of flies, all openings into the outer air shall be effectively screened and doors shall be self-closing.

(4) *Lighting and Ventilation.* All rooms shall be well lighted and ventilated.

(5) *Miscellaneous Protection from Contamination.* The various milk plant operations shall be so located

Rec.
Page

and conducted as to prevent any contamination of the milk or of the cleaned equipment. All means necessary for the elimination of flies shall be used. There shall be separate rooms for (a) intake or receiving room; (b) the pasteurizing, processing, cooling, and bottling operation, and (c) the washing and bacteri-
938 cidal treatment of containers. Pasteurized milk or milk products shall not be permitted to come in contact with equipment with which unpasteurized milk or milk products have been in contact, unless such equipment has first been thoroughly cleaned and subjected to bactericidal treatment. Rooms in which milk, milk products, cleaned utensils, or containers are handled or stored shall not open directly or indirectly into any stable or living quarters. The pasteurization plant shall be used for no other purpose than the processing of milk and milk products and the operations incident thereto, except as may be approved by the Health Commissioner. All equipment used in the milk plant shall meet the approval of the Health Commissioner.

(6) *Toilet Facilities.* Every milk plant shall be provided with toilet facilities conforming with the plumbing code of the State of Wisconsin and the ordinances of the City of Madison, Wisconsin. The toilet room shall be equipped with handwashing facilities, warm water, soap and disposable towels. Toilet rooms shall not open directly into any room in which milk, milk products, equipment, or containers are handled or stored. The doors of all toilet rooms shall be self-closing. Toilet rooms shall be kept in a clean condition, in good repair, well ventilated and contain a

Rec. Page

prominently posted sign "Wash hands before returning to work."

(7) *Water Supply.* The water supply shall be easily accessible, adequate and of a safe, sanitary quality, and shall comply with the Wisconsin Well Construction Code of the State Board of Health.

(8) *Hand-washing Facilities.* Convenient hand-washing facilities shall be provided in the processing room, including hot running water, soap and approved sanitary towels. The use of a common towel is prohibited.

939 (9) *Sanitary Piping.* All piping used to conduct milk or milk products shall be "sanitary milk piping", of material and condition meeting the approval of the Health Department. Pasteurized milk and milk products shall be conducted from one place of equipment to another only through sanitary milk piping and must be protected from contamination at all times.

(10) *Construction and Repair of Containers and Equipment.* All multi-use containers and equipment shall be constructed in such manner that all surfaces in contact with milk are readily accessible for cleaning following each usage, and shall be kept in good repair. The manufacture, packing, transportation and handling of single-service containers and container caps and covers shall be conducted in a sanitary manner.

(11) *Disposal of Wastes.* All waste and garbage shall be kept in covered metal containers.

(12) *Cleaning and Bactericidal Treatment of Containers and Equipment.* All milk and milk products

Rec. Page

containers and equipment, except single-service containers, shall be thoroughly cleaned after each usage. All containers shall be subjected to an approved bactericidal process after each cleaning. All equipment shall be subject to an approved bactericidal process immediately before each usage.

(13) *Storage of Containers and Equipment.* After bactericidal treatment, all bottles, cans, and other multi-use milk or milk products containers and equipment, shall be stored in such manner as to be protected from contamination.

(14) *Handling of Containers and Equipment.* Between bactericidal treatment and usage, and during usage, containers and equipment shall be handled or
940 operated in such manner as to prevent contamination of the milk.

(15) *Storage of Caps, Parchment Paper, and Single-Service Containers.* Milk-bottle caps or cap stock, parchment paper for milk caps, and single-service containers, shall be purchased and stored only in unopened sanitary tubes and cartons, respectively, and shall be kept therein in a clean dry place.

(16) *Pasteurization.* Pasteurization shall be performed as described in section 7.09 (15) of this ordinance.

(17) *Cooling.* All milk and milk products received for pasteurization shall immediately be cooled in approved equipment to 50° F. or less and maintained at that temperature until pasteurization, unless they are to be pasteurized within two (2) hours after receipt; and all pasteurized milk and milk products shall im-

Rec.
Page

mediately be cooled in approved equipment to a temperature of 50° F. or less, and maintained thereat until delivery.

(18) *Bottling.* Bottling of milk and milk products shall be done at the place of pasteurization in approved mechanical equipment.

(19) *Overflow Milk.* Milk or milk products gathered in any way from overflowing or leaking or otherwise poorly operated equipment shall not be sold for human consumption.

(20) *Capping.* Capping of milk, cream and milk products shall be done by approved mechanical equipment. Hand capping is prohibited. The cap or cover shall cover the pouring lip to at least its largest diameter. This shall not apply to milk in containers for cooking purposes only.

(21) *Personnel, Health.* Every person employed in a milk-pasteurization plant, or food establishment, etc., shall furnish such information, permit and physical examination, and submit such laboratory speci-
941 mens as the Department of Public Health may require for the purpose of determining freedom from infection.

(22) *Personnel, Cleanliness.* All persons coming in contact with milk, milk products, containers, or equipment shall wear clean outer garments and shall keep their hands clean at all times while thus engaged.

(23) *Miscellaneous.* All vehicles used for the transportation of milk or milk products shall be so constructed and operated as to protect their contents from the sun and from contamination. All vehicles

Rec. Page

used for the transportation of "processed milk or milk products" in their final delivery containers shall be constructed with permanent tops and with permanent sides and back, provided that openings of the size necessary to pass the delivery man may be permitted in the sides or back for loading and unloading purposes. All vehicles shall be kept clean, and no substance capable of contaminating milk or milk products shall be transported with milk or milk products in such manner as to permit contamination. All vehicles used for the distribution of milk or milk products shall have the name of the distributor prominently displayed.

The immediate surroundings of the milk plant shall be kept in a neat, clean condition.

7.17. *Milk and Milk Products Which May Be Sold.* After the date on which this ordinance takes effect no milk or milk products shall be sold to the final consumer or to restaurants, soda fountains, grocery stores, or similar establishments, except "*Grade A Pasteurized*" or "*Certified Pasteurized*": *Provided*,
942 that when any dairy plant at any time fails to qualify for the above grade in accordance with section 7.16 the Health Commissioner is authorized to revoke its license, or in lieu thereof, the Health Commissioner may permit the sale of the products of the dairy in question for a period not exceeding thirty (30) days or, in emergencies, such a longer period as he may deem necessary. During the thirty (30) day periods and during any such emergency the product shall be labelled as designated by the Health Commissioner.

Rec.
Page

7.18. *Reinstatement of License.* Upon receipt of a satisfactory application for reinstatement in the case of a suspended license or use of a Grade A label, as described in section 7.17 which has been the result of an excessive average bacterial plate count, direct microscopic count, or cooling temperature, the Health Commissioner shall take further samples of the applicants output, at the rate of not more than two (2) samples per week. The Health Commissioner shall reinstate the license or label whenever the average of the last four (4) sample results indicates the necessary quality has been attained, but not before the lapse of two (2) weeks from the date of suspension of license. In case the suspended license as described in section 7.17 was the result of violations of the specifications other than bacteriological standards or cooling temperature, the application must include a statement signed by the applicant to the effect that the violated item or items has been complied with. The Health Commissioner shall then make such inspections as he deems necessary to assure himself that all requirements have been met; and in case his findings so justify, he shall reinstate the license.

943 7.19. *Transferring or Dipping Milk; Delivery Containers; Delivery of Milk at Quarantined Residences; Communicable Disease.*

(1) Except as permitted in this section, no milk producer or distributor or vendor shall transfer milk or milk products from one container to another on the street, or in any vehicle or store or in any place, except a bottling or milk room especially used for that purpose. The sale of dip milk is hereby prohibited.

Rec.
Page

(2) All pasteurized milk and milk products shall be placed in their final delivery containers in the plant in which they are pasteurized. Milk and milk products sold in the distributor's containers in quantities less than one (1) gallon shall be delivered in approved milk bottles or in approved single-service containers. This shall not apply to milk in containers to be used for cooking purposes only.

(3) It shall be unlawful for hotels, soda fountains, restaurants, groceries, hospitals, and other similar eating establishments to sell or serve any milk or milk product except in the individual original containers in which it was received from the distributor. Food with milk or cream used as a flavoring for food or drink may be transferred into containers when taken from packages as provided.

(4) The delivery of milk or milk products to and the collection of milk or milk products containers from residences in which cases of communicable disease transmissible through milk supplies exists shall be subject to the special requirements of the Health Commissioner.

(5) It shall be unlawful for any hotel, soda fountain, restaurant, grocery, or similar establishment to sell or serve any milk or milk products, which have not been maintained while in its possession at a
944 temperature of 50° F. or less.

(6) Bottled milk or milk products, regardless of type of cap, if stored in water shall be so stored that the tops of the bottles will not be submerged.

(7) All persons to whom milk or milk products are delivered, shall clean thoroughly the containers in

Rec. Page

which such milk or milk products are delivered before returning the containers. Apparatus, containers, equipment and utensils used in the handling, storage, processing or transporting of milk or milk products shall not be used for any other purpose without the permission of the Health Commissioner.

(8) Notice shall be sent to the Health Commissioner immediately by any producer or distributor of milk or milk products upon whose dairy farm or in whose milk plant any infectious, contagious or communicable disease occurs or is suspected.

(9) When suspicion arises as to the possibility of transmission of infection from any person concerned with the handling of milk or milk products, the Health Commissioner is authorized to require any or all of the following measures:

(a) The immediate exclusion of that person from milk handling;

(b) The immediate exclusion of the milk supply concerned from distribution and use;

(c) Adequate medical and bacteriological examination of the person or his associates, and of his and their body discharges.

7.20. *Dairy Plant License; Producer Permits; Vendors License.*

(1) It shall be unlawful for any person to engage in the operation of a milk plant as defined in section 7.09 (19) of this ordinance without having first obtained a license therefor from the Clerk of the City
945 of Madison, Wisconsin, as hereinafter provided. Only a person who complies with the requirements of this ordinance shall be entitled to receive and retain a

Rec.
Page

license. An application shall be made in writing to the Clerk of said City setting forth:

(a) Name, post office address, and the exact location of the dairy.

(b) If the applicant does not keep cows the source or sources from which he obtains milk or cream for sale or delivery.

(c) Said applicant shall present written consent granting the Health Commissioner free and open access to the dairy plant and its premises for the purpose of making such inspections as he may deem necessary, regardless of whether the dairy plant is in operation or not.

(d) The application shall state whether Grade "A" Pasteurized milk or milk products, or Certified Pasteurized milk are to be sold.

(e) Such application shall state the average daily volume of milk processed and delivered and such other information as may be necessary to the Department of Public Health.

(f) A license fee of one ($1.00) dollar shall accompany the application.

(g) Upon receipt of an application for a dairy plant license the Health Commissioner shall make such inspections as are necessary to determine whether the dairy plant is in compliance with the provisions of this ordinance and whether the source of the milk supply is in reasonable compliance with the terms of this ordinance. Upon recommendation of the Health Commissioner the City Clerk shall issue a dairy plant license which shall expire on the first day of July following the date of issue, unless previously

Rec.
Page

revoked by the Health Commissioner due to non-compliance with the provisions of this ordinance.

946 (2) *Milk Producers Permit.* A milk producer must have a permit issued by the Department of Public Health. The milk producer permit application shall include the following information:

(a) The name and address of the farm owner.

(b) The name and address of the tenant, if there is one.

(c) The legal description of the premises.

(d) The name of the dairy plant to whom the milk is to be sold.

(e) A statement granting free access to the premises to the Health Commissioner at all times for such inspection as he may deem necessary.

(3) *Retail Milk Dealers Vendors License.* It shall be unlawful for any firm, corporation, association, or person operating any store, meat market, delicatessen, booth, or stand to sell, offer for sale, have in their possession with intent to sell, any milk, cream, or milk products whether to be consumed on the premises as a beverage, or to be removed from the premises without first having obtained a vendor's license.

(a) License must show name, residence, and exact location of the place of business where said application proposes to sell milk.

(b) The name of person from whom said milk, cream, or milk products are obtained for sale.

(c) The approximate number of quarts sold daily of said milk, cream or milk products.

Rec.
Page

Upon inspection of the premises by the Health Department and the Health Department notification to the City Clerk in writing that said premises upon which it is proposed to sell milk are equipped to handle such milk, cream, or milk products in a clean and sanitary way, and in compliance with all the provisions of this ordinance, and that said applicant
947 is a proper person to sell milk, cream or other milk products, the City Clerk upon receipt of one dollar ($1.00) shall cause to be issued a license in the name of the applicant, and the location of the place of business, such license to expire on the first day of July following the date of issue of same, unless otherwise revoked as hereinafter provided. Such license shall not be transferable.

7.21. *Pasteurization Plants to be Within Five Mile Radius.* It shall be unlawful for any person, association or corporation to sell, offer for sale or have in his or its possession with intent to sell or deliver in the City of Madison, any milk, cream or milk products as pasteurized unless the same shall have been pasteurized and bottled in the manner herein provided within a radius of five miles from the central portion of the City of Madison otherwise known as the Capital Square, at a plant housing the machinery, equipment and facilities, all of which shall have been approved by the Department of Public Health.

7.22. (1) *Insanitary Milk.*

(a) Definition. Milk drawn from cows kept in a filthy or unclean condition; or milk drawn from any sick cow or cows having running sores; or milk drawn from cows fed unwholesome food or refuse;

Rec. Page

or milk drawn from cows within fifteen (15) days before or five (5) days after calving; or milk to which has been added or into which has been introduced any preservatives or deleterious or filthy substance; or milk that is stale, putrescent or putrid; or milk to which has been added any unclean or unwholesome substance; or milk contaminated by being exposed to dirty, foul or unclean places or conditions is declared to be insanitary milk.

948 (b) *Insanitary Milk Probihited.* It shall be unlawful to sell or offer for sale, furnish or deliver, or have in possession or under control with intent to sell or offer for sale, or furnish, or deliver as food for man any insanitary milk as defined in section 7.22.

The Health Commissioner shall make inspections of each producers milk, as he may deem necessary, at the milk plant intake. Sediment tests, methylene blue tests or other tests shall be made to discover insanitary milk. Insanitary milk shall be rejected as food for man and identified in a manner that will not prevent its use as food for animals. The Health Commissioner is authorized to add a certified food color to each can of insanitary milk as identification. Milk rejected because the cooling standards as described in section 7.15(24), have been violated, may be identified by the addition of buttermilk.

7.23. *Emergency Milk.* If and when an emergency shall develop, that milk or milk products conforming to the terms of this ordinance shall not be available or shall be difficult to secure in sufficient quantities to meet the needs of the City of Madison, the Health

Rec. Page

Commissioner may grant permission to a dairy plant, upon their application, to secure emergency milk from such sources as he may authorize. Such milk shall then be processed in accordance with the terms of this ordinance. The dairy plant shall furnish a detailed statement of the volume and source of such emergency milk or milk products. If the emergency milk or milk products does not meet the requirements of this ordinance the Grade "A" label shall not be used. Milk from such sources shall be labeled "Ungraded."

949 7.24. *Health Commissioner to Announce Grades.* At least once every six months the Health Commissioner of the City of Madison shall announce the grades of all milk and milk products delivered by all distributors and ultimately consumed within the City of Madison.

7.25. *Enforcement Interpretation.* This ordinance shall be enforced by the Health Commissioner in accordance with the interpretations thereof contained in the current edition of the United States Public Health Service Milk Code, a certified copy of which shall be on file in the City Clerk's office; *Provided,* that in case of upward revisions, the provisions shall be interpreted according to the provisions expressed in this ordinance.

7.26. *Provisions Severable.* The provisions of this ordinance shall be severable, and if any of the provisions shall be held in contravention of the Constitution and Laws of the State of Wisconsin, or the United States, the decision of the Court shall not

Rec. Page

affect the validity of the remaining portions. It is hereby declared to be the intent of this ordinance that the same would have been adopted had such unconstitutional or unlawful provisions, if any, not been included therein.

7.27. *Penalty.* Any person violating any provision of this ordinance shall be fined not less than five dollars ($5.00), nor more than fifty dollars ($50.00) for each offense or by the cancellation of the license as hereinbefore provided for, or by such fine and cancellation of license. Each and every violation of the provisions of this ordinance shall constitute a separate offense.

2. Section 7.08 to section 7.18, inclusive, of the
950 General Ordinances of the City of Madison are hereby repealed.

3. This ordinance shall be in effect from and after its passage and publication.

McGowan, Geffs, Geffs & Block,
Attorneys for Appellant-
Plaintiff, Dean Milk Company.

Of Counsel:
Gariepy & Gariepy,
Chicago, Illinois.

INDEX TO APPENDIX.

PAGE

Opinion of Trial Court 1

Plaintiff's Second Amended Complaint 19

Answer to Second Amended Complaint 33

Findings of Fact, Conclusions of Law, Order for Judgment 51

Declaratory Judgment and Judgment Dismissing Second Cause of Action of Plaintiff's Second Amended Complaint 57

Bill of Exceptions 59

WITNESSES.

Alder, Mr. Robert
- Direct examination 103
- Cross examination 104
- Redirect examination 104

Burger, Mr. J. H.
- Direct examination 88
- Cross examination 90
- Redirect examination 92
- Recross examination 92

Corbett, Dr. W. J.
- Direct examination 74
- Cross examination 84
- Redirect examination 87
- Recross examination 102

Davis, Mr. James H.
Direct examination 97
Cross examination 101
Redirect examination 101

Fauerbach, Dr. Louis
Direct examination 129
Cross examination 136

Friday, Mr. Edward R.
Direct examination 122
Cross examination 124
Redirect examination 128

Kincaid, Dr. C. K.
Adverse examination 59
Direct examination 70
Cross examination 72

Livingston, Mr. Park
Direct examination 104
Cross examination 109
Redirect examination 113
Recross examination 114

Luchterhand, Mr. Clarence
Direct examination 143
Cross examination 150
Redirect examination 157

Nichols, Mr. M. Starr
Direct examination 159
Cross examination 160

Thew, Mr. Harvey
Direct examination 117
Cross examination 120

Welch, Dr. Fred B.
Direct examination 93
Cross examination 94
Redirect examination 97

EXHIBITS.

No.

1. U. S. Public Health Code 161
2. Revised Milk Ordinance recommended by U. S. Public Health Service 193
3. Letter from U. S. Public Health Service 195
4. Letter to the Commissioner of Health, Madison, Wisconsin 196

584-646 Exhibits 5-17. Chicago Milk Ordinance and Regulations of the Chicago Board of Health (not printed).

647-728 Exhibit 18. Certified copy of Milk Pasteurization Plant Law of Illinois (not printed).

729-784 Exhibit 19. Certified copy of Grade A Milk Pasteurized—Raw Grade A Milk Products Law of Illinois (not printed).

785 Exhibit 20. Chicago Board of Health Milk Plant Permit Number 38 issued to Dean Milk Company at Huntley, Illinois, on June 20, 1946 (not printed).

786 Exhibit 21. Chicago Board of Health Milk Plant permit number 37 issued to Dean Milk Company at Chemung, Illinois, on December 5, 1946 (not printed).

787 Exhibit 22. Chicago Board of Health milk receiving station permit No. 1619 issued to Dean Milk Company at Rockford, Illinois, on February 28, 1949 (not printed).

788 Exhibit 23. Chicago Board of Health milk distributor permit number 1521 issued to Dean Milk Company at 20 N. Wacker Drive, Chicago, Illinois, on June 22, 1936 (not printed).

789 Exhibit 24. Chicago Board of Health milk receiving station permit number 1578 issued to Dean Milk Company, Belvidere, Illinois, on June 20, 1946 (not printed).

790 Exhibit 25. Chicago Board of Health milk receiving station permit number 1534 issued to Dean Milk Company, Darien, Wisconsin, on May 2, 1947 (not printed).

791 Exhibit 26. Illinois Dept. of Health 1949 certificate of approval—pasteurization plant owned by Dean Milk Company at Chemung, Illinois (not printed).

792 Exhibit 27. Illinois Dept. of Health permit to label milk and milk products Grade A issued to Dean Milk Company, Huntley, Illinois, on May 8, 1947 (not printed).

793 Exhibit 28. Illinois Dept. of Agriculture to operate a dairy plant addressed to Dean Milk Company, Chemung, Illinois, dated Sept. 28, 1948 (not printed).

794 Exhibit 29. Illinois Dept. of Health 1949 certificate of approval for pasteurization plant owned by Dean Milk Company, Huntley, Illinois (not printed).

795 Exhibit 30. Paper milk carton labeled Grade A pasteurized-homogenized Vitamin D milk Dean Milk Company, Chemung, Illinois, Chicago Board of Health Permit No. 37 (not printed).

796 Exhibit 31. Paper milk carton labeled as Exhibit 30 except Dean Milk Company, Huntley, Illinois, Chicago Board of Health Permit No. 38 (not printed).

797 Exhibit 32. Wisconsin Dept. of Agriculture laboratory report on two samples of Dean's milk picked up at store in Whitewater, Wisconsin on Sept. 12, 1949 (not printed).

798-800 Exhibit 33. Certified copy of milk ordinance of Janesville, Wisconsin (not printed).

801 Exhibit 34. Chicago Board of Health Dairy Farm permit issued to Mr. Raymond Pyse, Oregon, Illinois (not printed).

802 Exhibit 35. Patron quality record showing results of the following tests: Meth. blue, sediment, temperature, resazurin, breed count, pasteurizability (not printed).

803 Exhibit 36. Patron scoring sheet by Dean Milk Company, showing patron's score on:

1. Bacteria count
   a. Microscopic
   b. Methylene blue
   c. Laboratory pasteurized count
2. Visible dirt
   a. Clean
   b. Fairly clean
   c. Dirty
   d. Very dirty

3. Temperature
   a. Under 60° F.
   b. 60° to 65° F.
   c. Above 65° F.
   (not printed)

804-805 Exhibit 37. Printed postal card to patron giving data contained in Exhibit 36 (not printed).

806-807 Exhibit 38. Printed postal card to patron giving results of an inverted methylene blue test (not printed).

808 Exhibit 39. Detailed Dairy Farm Inspection Report of Dean Milk Company, giving detailed information on: 1. cows, 2. Dairy barns, 3. milk house, 4. toilet, 5. water supply, 6. utensils, 7. milking, 8. feed, 9. employees, and 10. vehicles (not printed).

Exhibit 40. Wisconsin Crop and Livestock Reporter 197

813-874 Exhibit 41. Pamphlet entitled Dane County Agriculture. The data offered by the defendants contained in this pamphlet was read into the record at pages 277 and 278 (not printed).

876-884 Exhibit 42. Methods of making sanitation ratings of milk sheds issued by the United States Public Health Service. The data offered by the defendants contained in this exhibit was read into the record at pages 352, 356-357 (not printed).

Exhibit 43. Letter from Illinois Department of Health 198

Exhibit 44. Defendants' original answer..... 199

Exhibit 45. Madison ordinance of August 27, 1949 237

[fols. 281-282] IN SUPREME COURT OF WISCONSIN

August Term, 1949

No. 216

DEAN MILK COMPANY, a corporation, Plaintiff-Appellant,

vs.

CITY OF MADISON, WISCONSIN, a Municipal Corporation, Dr. C. K. Kincaid as Health Commissioner for the City of Madison, Wisconsin, Leonard Howell, as City Manager of the City of Madison, Wisconsin, and The Common Council of the City of Madison, Wisconsin, Defendants-Appellees.

PETITION FOR APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN TO THE SUPREME COURT OF THE UNITED STATES

To: Honorable Oscar M. Fritz, Chief Justice of the Supreme Court of the State of Wisconsin:

Dean Milk Company, a corporation, your petitioner, respectfully shows:

1. Petitioner is the appellant in the above entitled cause.

2. The above named appellant commenced an action in the Circuit Court of Dane County, Wisconsin, on November 20, 1948, to have declared unconstitutional a section of the city milk ordinance of the City of Madison, Wisconsin, which section prohibited the sale of your petitioner's pasteurized Grade A milk because it had not been pasteurized within five (5) miles of the capitol building in the City of Madison, Wisconsin, and to compel the City of Madison, Wisconsin to issue milk distributor's license to the petitioner; pending this action the City of Madison, Wisconsin, on August 27, 1949, enacted a new ordinance retaining the five mile limitation and adding a new limitation of twenty-five (25) miles for the inspection of farms producing the milk which was the source of your petitioner's supply of milk; that on October 5, 1949, your petitioner filed its second [fol. 283] amended complaint asking to have its rights declared as to each limitation and to have each declared un-

constitutional, and for a declaration of your petitioner's right to sell pasteurized Grade A milk in the City of Madison notwithstanding the above limitations; that the trial was before the Court without a jury and on December 30, 1949, Court entered a judgment declaring.

(a) That the 5-mile limitation was constitutional and

(b) That no justiciable controversy existed as to the 25-mile limitation and dismissed your petitioner's complaint as to that question.

An appeal from said judgment to Supreme Court of the State of Wisconsin, was affirmed by the said Supreme Court on the 30th day of June, 1950, and said judgment has become and is a final judgment.

In said cause it is drawn in question the validity of two sections of the city ordinance of the City of Madison, Wisconsin, on the ground of their being repugnant to the Constitution of the United States, and the decision is in favor of their validity: that said ordinance provides:

> "7.21. Pasteurization Plants to be Within Five Mile Radius. It shall be unlawful for any person, association or corporation to sell, offer for sale or have in his or its possession with intent to sell or deliver in the City of Madison, any milk, cream, or milk products as pasteurized unless the same shall have been pasteurized and bottled in the manner herein provided within a radius of five miles from the central portion of the City of Madison otherwise known as the Capital Square, at a plant housing the machinery, equipment and facilities, all of which shall have been approved by the Department of Public Health."

> "7.11. Permits * * * On the filing of an application for a permit with the Health Commissioner he shall cause the source of supply named therein to be inspected and shall cause all other necessary inspections and investigations to be made. The Health Department shall not be obligated to inspect and issue permits to farms located beyond twenty-five (25) miles from the central portion of the City of Madison, otherwise known as the Capital Square."

[fol. 284] that said sections and each of them are in violation of Section 8 of Article I of the United States Consti-

tution which provides that the Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes; and said sections of the city ordinance are in violation of the first section of the 14th Amendment of the Constitution of the United States in that they deny this petitioner of his property without due process of law and deny to this petitioner equal protection of the laws; that the action of the Circuit Court of Dane County, Wisconsin, and of the Supreme Court of the State of Wisconsin, in refusing to pass upon and to declare unconstitutional Section 7.11 of the above ordinance upon the ground that no justiciable controversy existed because of the presence and validity of Section 7.21 of the above ordinance and because of the fact that the farmers from whom your petitioner purchases its milk and who have no title in the said milk after it is sold to your petitioner, were not party plaintiffs in the above entitled action constitutes a denial to the petitioner of his rights under the first section of the 14th Amendment of the Constitution of the United States in that it denies the petitioner his right to property and to contract without due process of law and denies to this petitioner equal protection of the laws.

Wherefore petitioner prays for the allowance of an appeal from said Supreme Court of the State of Wisconsin, to the Supreme Court of the United States in order that the decision of the Supreme Court of the State of Wisconsin, may be examined and reversed, and also prays that a transcript of the record, proceedings and papers in this case duly authenticated by the Clerk of the Supreme Court of the State of Wisconsin, may be sent to the Supreme Court of the United States as provided by law.

[fols. 285-286] The errors upon which your petitioner claims to be entitled to an appeal are those above indicated and more fully set out in the Assignment of Errors filed herewith.

Dated July 24, 1950.

J. Arthur Moran, Delavan, Wisconsin, Attorney for Petitioner and Proposed Appellant.

George S. Geffs, Jacob Geffs and Eli Block of McGowan, Geffs, Geffs & Block, Janesville, Wisconsin, of Counsel.

[fol. 287] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS

The said Dean Milk Company, a corporation, assigns the following errors in the record and proceedings of the said case:

1. The Supreme Court of the State of Wisconsin, erred in holding and deciding that Section 7.21 of the Madison City Ordinance which reads:

> "*Pasteurization Plants to be Within Five Mile Radius.* It shall be unlawful for any person, association or corporation to sell, offer for sale or have in his or its possession with intent to sell or deliver in the City of Madison, any milk, cream or milk products as pasteurized unless the same shall have been pasteurized and bottled in the manner herein provided within a radius of five miles from the central portion of the City of Madison otherwise known as the Capital Square, at a plant housing the machinery, equipment and facilities, all of which shall have been approved by the Department of Public Health.",

did not deprive appellant of its property rights without due process of law, did not deprive appellants or its right of contract, and did not deny to the appellant the equal protection of the laws within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

2. The Supreme Court of the State of Wisconsin erred in holding and deciding that said Section 7.21 of the City [fol. 288] Ordinance of the City of Madison as applied to the appellant did not violate Section 8, Article I of the Constitution of the United States, being what is commonly called the Interstate Commerce clause of the United States Constitution.

3. The Supreme Court of the State of Wisconsin erred in refusing to declare unconstitutional Section 7.11 of the city ordinance of the City of Madison which reads:

> "*Permits.* It shall be unlawful for any person to bring into or receive into the City of Madison, Wis-

consin, or its police jurisdiction, for sale, or to sell, or offer for sale therein, or to have in storage where milk or milk products are sold or served, any milk or milk product as defined in this ordinance from a source not possessing a permit from the Health Commissioner of the City of Madison, Wisconsin.

Only a person who complies with the requirements of this ordinance shall be entitled to receive and retain such a permit.

On the filing of an application for a permit with the Health Commissioner he shall cause the source of supply named therein to be inspected and shall cause all other necessary inspections and investigations to be made. The Health Department shall not be obligated to inspect and issue permits to farms located beyond twenty-five (25) miles from the central portion of the City of Madison, otherwise known as the Capital Square. If the source of supply named therein conforms to the standards of this ordinance a permit may be issued by the Department of Public Health and shall remain in effect unless revoked in accordance with the provisions of this or other ordinances of the City of Madison, or until there is a change in ownership or tenancy of the premises." * * *

and erred in not holding that the said section deprived the appellant of its property rights without due process of law, deprived the appellant of its right of contract and deprived the appellant of the equal protection of the laws within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

4. The Supreme Court of the State of Wisconsin erred in refusing to hold and refusing to decide that said Section [fols. 289-290] 7.11 of the city ordinance of the City of Madison as applied to the appellant did not violate Section 8, Article I of the Constitution of the United States by what is commonly called the Interstate clause of the United States Constitution.

5. The Supreme Court of the State of Wisconsin erred in holding that no justiciable controversy was involved as to whether Section 7.11 of the Madison ordinance did or did not violate the 14th Amendment to the Constitution of the United States and did or did not violate Section 8 of

Article I of the Constitution of the United States and that such holding together with the holding of the Supreme Court of the State of Wisconsin that the appellant could not have its rights decided because Section 7.21 of the City ordinance of the City of Madison prohibited appellant from selling milk and milk products in the city of Madison anyway, and holding that the absence of approximately 950 farmers in northern Illinois and southern Wisconsin as party plaintiffs prevented appellant from having its rights declared as to Section 7.11 of the Madison ordinance, deprived this appellant of due process of law, deprived this appellant of its right to its property and its right of contract and denied this appellant the equal protection of the laws within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

* * * * * * *

PRAYER FOR REVERSAL

For which errors said Dean Milk Company, a corporation, appellant herein, prays that the said decision and judgment of the Supreme Court of the State of Wisconsin, dated June 30, 1950, be reversed and that a judgment be rendered in favor of said appellant herein, and for costs.

Dated at Janesville, Wisconsin, this 24th day of July, 1950.

J. Arthur Moran, Attorney for Appellant, Delavan, Wisconsin.

George S. Geffs, Jacob Geffs & Eli Block of McGowan, Geffs, Geffs & Block, Janesville, Wisconsin, of Counsel.

[fol. 291] IN SUPREME COURT OF WISCONSIN

[Title omitted]

ORDER ALLOWING APPEAL TO SUPREME COURT OF UNITED STATES

The petition of Dean Milk Company, a corporation, for an appeal in the above cause to the Supreme Court of the United States from the Supreme Court of the State of Wis-

consin, and an assignment of errors filed therewith and the record of said cause having been considered,

It is ordered that an appeal be and is allowed to the Supreme Court of the United States from the Supreme Court of the State of Wisconsin, as prayed in said petition, and that the Clerk of the Supreme Court of the State of Wisconsin, shall prepare and certify a transcript of the record and proceedings in the above cause and transmit the same to the Supreme Court of the United States within forty (40) days from the date hereof.

It is further ordered that the said petitioner shall give good and sufficient security in the sum of Two Hundred Fifty Dollars ($250.00); that said appellant shall prosecute said appeal to effect, and if said appellant fails to make its plea good it shall answer all damages and costs.

The said appellant now presenting a bond in the sum of Two Hundred Fifty Dollars ($250.00) signed by the Standard Accident Insurance Company of Michigan, authorized to do business in Wisconsin, as surety;

[fols. 292-293] It is therefore ordered that the same be, and hereby is, approved.

The appeal shall operate as a supersedeas.

Timothy Brown, Acting Chief Justice of the Supreme Court of Wisconsin.

Dated: July 25, 1950.

[fols. 294-296] Bond on appeal for $250.00 omitted in printing.

[fols. 297-299] Citation in usual form showing service on Harold E. Hanson omitted in printing.

[fols. 300-301a] In Supreme Court of Wisconsin

[Title omitted]

Stipulation of Record in the United States Supreme Court

Whereas the above entitled action is being appealed to the United States Supreme Court; and

Whereas the Appellant's printed appendix filed in the Supreme Court for the State of Wisconsin, has reduced

the testimony to narrative form and contains all of the material parts of the record which was presented to that court;

Now therefore it is stipulated that the appellant's printed appendix, together with the transcript of all of the papers required by Rule 12 of the United States Supreme Court rules may be transmitted by the Clerk of the Supreme Court of Wisconsin to the Clerk of the United States Supreme Court as the record in the above appeal and that the Clerk of the United States Supreme Court in case the appeal is allowed by the United States Supreme Court may print this stipulated record as the record in the said United States Supreme Court.

It is further stipulated that the Defendants-Appellees by making this stipulation do not waive any right to object to the allowance of the appeal by the United States Supreme Court.

Dated July 24, 1950.

J. Arthur Moran, Attorney for Petitioner Appellant, Delavan, Wisconsin. Harold E. Hanson, Attorney for Appellees, Madison, Wisconsin.

George S. Geffs, Jacob Geffs and Eli Block of McGowan, Geffs, Geffs & Block, Janesville, Wisconsin, of Counsel.

[fol. 302] [Caption omitted]

[fol. 303] [File endorsement omitted]

In Circuit Court for Dane County

[Title omitted]

Notice of Appeal—Filed January 12, 1950

Please Take Notice that the Dean Milk Company, a corporation, plaintiff in this action, hereby appeals to the Supreme Court of the State of Wisconsin, from the judgment rendered and entered in this action and the Circuit Court in the County of Dane on the 30- day of December, 1949, in favor of the defendants and against the plaintiff, denying the plaintiff the relief prayed for in his complaint,

a copy of which judgment is attached hereto, and from the whole of said judgment.

Dated this 31 day of December, 1949.
By McGowan, Geffs, Geffs & Block, Plaintiff's Attorneys.

To Harold E. Hanson, Attorney for the Defendants; Myrtle L. Hansen, Clerk of Circuit Court; Thomas E. Fairchild, Atty. General for the State of Wisconsin.

[fols. 304-305] Declaratory Judgment and Judgment Dismissing Second Cause of Action of Plaintiff's Second Amended Complaint—Omitted. Print page 57 ante

[fol. 306] Bond on appeal for $250.00 filed January 12, 1950 omitted in printing.

[fol. 307] Due service of within Notice of Appeal and Undertaking admitted this 3 day of January A. D. 1950.

Harold E. Hanson, Attorneys for Defendants.

Service admitted, REB, 5 Jan 50 Thomas E. Fairchild, Attorney General per Richard E. Barrett, Asst. Atty. General.

[fol. 308] In Supreme Court of Wisconsin

[Title omitted]

Minute Entry—June 5, 1950

And now at this day came the parties herein, by their attorneys, and this cause having been argued by Jacob Geffs, Esq., for the said appellant, and by Harold E. Hanson, Esq., City Attorney, for the said respondents, and submitted, and the Court not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

[fols. 309-310] In Supreme Court of Wisconsin

Dane Circuit Court. Opinion by Justice Broadfoot.

Dean Milk Company, a Corporation, *Appellant*,

vs.

City of Madison, Wisconsin, a Municipal Corporation, Dr. C. K. Kincaid, as Health Commissioner for the City of Madison, Wisconsin, Leonard Howell, as City Manager of the City of Madison, Wisconsin, and The Common Council of the City of Madison, Wisconsin, *Respondents*

Judgment—June 30, 1950

This cause came on to be heard on appeal from the judgment of the Circuit Court of Dane County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Dane County, in this cause, be, and the same is hereby, affirmed with costs against the said appellant taxed at the sum of Seventy-nine Dollars and Fifty Cents ($79.50).

Justice Hughes dissents.

[fol. 311] In Supreme Court of Wisconsin

Dean Milk Co., a corporation, Appellant,

v.

City of Madison, Wisconsin, a municipal corporation, et al., Respondents

Appeal from a judgment of the circuit court for Dane county: Alvin C. Reis, Circuit Judge. Affirmed.

Opinion—Filed June 30, 1950

This is an action by the Dean Milk Company, an Illinois corporation, against the city of Madison, Dr. C. K. Kincaid, its health commissioner, Leonard Howell, its city manager, and its common council, for a declaratory judgment as to the constitutionality of two sections of the milk ordinance

of said city providing substantially as follows: (1) No milk shall be sold as pasteurized milk in the city of Madison unless it has been pasteurized and bottled within a radius of five miles from the capitol square; and (2) the health department shall not be obligated to inspect and issue permits to farms supplying raw milk for sale in said city if said farms are located beyond twenty-five miles from the capitol square. Judgment was entered December 30, 1949, [fol. 312] declaring: (1) That the five-mile limitation is constitutional, and (2) that in this action no justiciable controversy existed as to the twenty-five mile limitation and plaintiff's complaint was dismissed so far as it involved that question. Plaintiff appealed from the judgment.

Plaintiff is engaged in distributing Grade A pasteurized milk and other milk products in Chicago and other communities in Illinois and southern Wisconsin, including some within Dane county. It purchases and gathers milk from approximately nine hundred fifty farms located in northern Illinois and southern Wisconsin. None of these farms is within twenty-five miles of Madison. It pasteurizes and bottles the milk so gathered in plants at Chemung and Huntley, Illinois. The exact distance from these plants to Madison does not appear in the record, but they are located beyond the southern boundary of the state of Wisconsin which is approximately fifty miles from Madison.

On March 8, 1948, the plaintiff applied to the city of Madison for a license to sell its Grade A pasteurized milk and other milk products within the city. On March 12, 1948, its application for such license was denied. On November 20, 1948, plaintiff commenced this action for declaratory relief. While this suit was pending, and on August 27, 1949, the city of Madison adopted a new ordinance retaining the five-mile limitation and inserting the twenty-five mile limitation, which up to that time had not been a part of its milk ordinance. On October 1, 1949, plaintiff applied to the Madison Board of Health for nine hundred fifty farm [fol. 313] application blanks. They were not forwarded. Plaintiff then filed an amended complaint attacking both the five-mile and twenty-five mile limitations. The defendants secured an order to show cause why all reference to the twenty-five mile limitation should not be stricken from the plaintiff's amended complaint. The trial court denied this order to show cause but ordered plaintiff to file a

second amended complaint separating the two causes of action. Thereafter the plaintiff filed its second amended complaint.

The testimony of plaintiff's witnesses showed in detail the means used by the plaintiff to inspect the farms from which it purchased raw milk and the inspection and care taken in each step after the milk was gathered from the farm until bottled and delivered to dealers for sale. Plaintiff also introduced testimony as to the inspection made by the inspectors of the Chicago Health Department and of spot checks by inspectors for the United States Public Health Service.

The defendants, by their witnesses, showed that Madison is the center of Dane county which in 1948 produced six hundred million pounds of milk, more than ten times the amount consumed in the city. They also showed in detail how the city inspected the farms producing milk for consumption within the city and the plants in which it is pasteurized and bottled. Both sides showed the tests made in their laboratories as to raw milk from the farms and also of the products after pasteurization.

[fol. 314] Broadfoot, J. The testimony introduced proves conclusively that milk is a very perishable product, and that it is subject to contamination by odors, by foreign substances, and by bacteria. In order to be sure of healthful milk of high quality it is necessary to have rigid and frequent inspection of the farms producing raw milk for human consumption. It is necessary to inspect the ventilation, lighting and cleanliness of the barns in which the cows are sheltered, the drainage and water supply, the milking equipment, the cooling and storage equipment, and the health of the cattle and of the persons taking care of the milk, as well as the pasteurization plants.

The plaintiff contends that its inspection, with that of the Chicago Board of Health and spot checks by the United States Public Health Service, result in a product that is clean, pure and wholesome, and that it should be permitted to flow freely to market unburdened by duplication of inspection and that the restrictions in the Madison milk ordinance are prohibitive trade barriers and therefore unconstitutional under the Fourteenth Amendment and the Interstate Commerce Clause of the United States con-

stitution. The courts of some states have so held. This court has held otherwise in *Dyer v. City Council of Beloit*, 250 Wis. 613, 27, N. W. (2d) 733, in which it held valid an ordinance of the city of Beloit which contained the following provision:

"No pasteurized milk shall be sold in the city of Beloit which shall not have been pasteurized in approved plants within six miles from the intersection of State street and East Grand avenue in the city of Beloit."

In that case the court said, p. 616:

[fol. 315] "That cities have a right to pass a milk ordinance for the welfare and health of their citizens is not disputed, and milk ordinances are general in the state of Wisconsin and elsewhere in the nation. Such an ordinance must be reasonable and not arbitrary, must not go beyond the reasonable demands of the occasion, and must tend to accomplish the purpose of its adoption. Courts will not interfere with the exercise of police power by a municipal corporation in the absence of a clear abuse of discretion and unless it is manifestly unreasonable and oppressive, for it is not within the province of the courts, except in clear cases, to interfere with the exercise of this power reposed by law in municipal corporations. 11 Am. Jur., Constitutional Law, p. 1092, sec. 307. Municipal corporations are *prima facie* the sole judges respecting the necessity and reasonableness of ordinances under their police power, and every intendment is to be made in favor of the lawfulness and reasonableness of such ordinance. The city is presumed to have full knowledge of local conditions, and its adoption of an ordinance in the light of this knowledge creates a *prima facie* presumption that it is reasonable. 3 McQuillin, Mun. Corp. (2d ed.) p. 110, sec. 951. The reasonableness of an ordinance depends upon the purposes sought to be accomplished and the effect upon all who must comply with it."

The present status of the decision in the *Dyer Case* is in dispute. The plaintiff in that case appealed to the United States supreme court and while the appeal was pending the city of Beloit amended its ordinance and granted Dyer a license. A motion was then made on behalf

of the Beloit authorities to dismiss Dyer's appeal upon the ground that the case had become moot. Plaintiff Dyer objected to dismissing the appeal but the United States supreme court on February 2, 1948, entered a mandate providing in part:

"On consideration of the motion of the appellees to dismiss, if appearing that the cause has become moot, the judgment of the supreme court of Wisconsin is vacated and the cause is remanded for such further proceedings as by that court may be deemed appropriate." 333 U. S. 825.

Thereafter this court (252 Wis. 249, 250, 32 N. W. (2d) 333) after reviewing the action of the United States Supreme court and quoting the above portion of its mandate [fol. 316] entered the following mandate:

"By the Court.—Judgment appealed from is reversed and cause remanded with directions to dismiss the complaint."

The plaintiff contends that this eliminated the decision in the *Dyer Case*. The trial court answered this argument as follows:

"This *pro forma* action, the Supreme Court at Washington by vacating and the Wisconsin Supreme Court by so-called reversing, under the circumstances, surely has not erased and annihilated our supreme court's decision in the *Beloit* case *on the merits*.

"Said the Supreme Court of the United States in *Berry v. Davis*, 242 U. S. 468, 470; 61 L. Ed. 441, 442;

" 'An appeal was taken to this court in 1914. In 1915 the Act of 1913 was repealed, and the substituted act does not apply to the plaintiff. * * * Therefore, upon the precedents we are not called upon to consider the propriety of the action of the district court, but the proper course is to reverse the decree and remand the cause, with directions that the bill be dismissed without costs to either party.' "

Whatever the effect of the mandate of this court in the *Dyer Case* after the record was remanded by the United States supreme court, the reasoning and logic of that decision still stand.

In addition to what was said by this court in the *Dyer Case*, once the plaintiff has recognized the necessity of rigid

standards for the production, processing and marketing of milk for human consumption and the necessity of frequent and rigid inspection to see that these standards are maintained, then it follows, as stated in the *Dyer Case* (p. 617), "Convenience, efficiency, and cost of inspection enter into a determination of the question of the reasonableness of an ordinance." Dr. Kincaid, the health commissioner of the city of Madison, testified that if plaintiff's [fol. 317] milk was to be sold in Madison it would require the hiring of additional inspectors to inspect the farms from which the milk is gathered and the plants in which it is pasteurized and bottled. Thus convenience and efficiency would be lessened and costs would be increased. Plaintiff contends that it would be unnecessary to hire additional inspectors, and that Dr. Kincaid as health commissioner could satisfy himself as to the quality of plaintiff's product by relying upon the inspections already made of the farms and plants in Illinois. The trial court made this answer to that contention:

"A city like Madison, in the interests of public health, is entitled to set up its own system of milk inspection, if it be a reasonable one. The city is not forced to rely upon inspection by some other governmental unit nor to submit to 'reciprocal inspection' unless some higher authority properly decrees it.

"One municipality does not have to sacrifice its standards to those of another community which may be lower nor is one governmental unit necessarily compelled to yield its independence to another, even though the latter's gauges of inspection purport to be equal or slightly higher.

"The city of Madison—in the public concern over health—has an autonomy, a measure of local self-government, which, if exercised reasonably, need give way only to a constitutional enactment by the legislature of Wisconsin or the Congress of the United States, if such exists. None such does exist as yet."

We agree with the trial court. The five-mile limitation as to pasteurization plants is reasonable as applied to this plaintiff. It has no pasteurization plant within any reasonable distance of Madison. This provision of the ordinance was not adopted to exclude plaintiff, nor does it discriminate [fol. 318] against it.

As to plaintiff's contention that the twenty-five mile limitation is likewise unconstitutional, we affirm the trial court in holding that there is no justiciable controversy between the parties on that question. Dean Milk Company is not a farmer and, so far as the record shows, owns no farm. No farmer producing milk is a party to this action, and plaintiff is not entitled to ask for a judgment declaring the rights of persons who are not parties to the action.

By the Court.—Judgment affirmed.

[fol. 319] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 320] In Supreme Court of the United States

Statement of Points To Be Relied Upon and Designation of Record—Filed August 2, 1950

Comes Now the Appellant, Dean Milk Company, a corporation, and states that its appeal is from the whole of the final judgment given, made and entered in the above entitled cause on the 30th day of June, 1950, and that said appellant will rely upon its appeal herein on the following points:

I. That the Supreme Court of the State of Wisconsin erred in finding that the ordinance of the City of Madison, Wisconsin, which reads:

> "7.21. *Pasteurization Plants to be Within Five Mile Radius.* It shall be unlawful for any person, association or corporation to sell, offer for sale or have in his or its possession with intent to sell or deliver in the City of Madison, any milk, cream or milk products as pasteurized unless the same shall have been pasteurized and bottled in the manner herein provided within a radius of five miles from the central portion of the City of Madison otherwise known as the Capital Square, at a plant housing the machinery, equipment and facilities, all of which shall have been approved by the Department of Public Health,"

is not a trade barrier and does not violate the right of contract guaranteed under the 14th amendment to the Constitu-

tion of the United States and did not deprive the appellant of its property without due process of law and did not deny [fol. 321] the appellant the equal protection of the law under the 14th amendment to the Constitution of the United States.

II. That the said Supreme Court of the State of Wisconsin erred in finding that the said Section 7.21 above quoted from the ordinance of the City of Madison, Wisconsin, is not in conflict with Section 8, Article I of the Constitution of the United States generally known as the Interstate Commerce Clause of the Constitution.

III. That the Supreme Court of the State of Wisconsin erred in finding that said Section 7.21 of the ordinance of the City of Madison, Wisconsin, above quoted is a reasonable exercise of the police power of the City of Madison, Wisconsin.

IV. That the Supreme Court of the State of Wisconsin erred in not finding that Section 7.11 of the ordinance of the City of Madison, Wisconsin, which reads:

> "7.11. *Permits.* It shall be unlawful for any person to bring into or receive into the City of Madison, Wisconsin, or its police jurisdiction, for sale, or to sell, or offer for sale therein, or to have in storage where milk or milk products are sold or served, any milk or milk product as defined in this ordinance from a source not possessing a permit from the Health Commissioner of the City of Madison, Wisconsin.
>
> "Only a person who complies with the requirements of this ordinance shall be entitled to receive and retain such a permit.
>
> "On the filing of an application for a permit with the Health Commissioner he shall cause the source of supply named therein to be inspected and shall cause all other necessary inspections and investigations to be made. The Health Department shall not be obligated to inspect and issue permits to farms located beyond twenty-five (25) miles from the central portion of the City of Madison, otherwise known as the Capital Square * * * ".

was a trade barrier and deprived the appellant of its property without due process of law, deprived the appellant of

[fol. 322] its right of contract and denied the appellant the equal protection of the law under the 14th amendment to the Constitution of the United States.

V. That the Supreme Court of the State of Wisconsin erred in not finding that said Section 7.11 of the ordinance of the City of Madison above quoted was in conflict with Section 8, Article I of the Constitution of the United States commonly known as the Interstate Commerce Clause of the Constitution.

VI. That the Supreme Court of the State of Wisconsin erred in refusing to adjudicate appellant's rights in regard to said Section 7.11 of the ordinance of the City of Madison, Wisconsin; for failing to hold that said Section 7.11 was unreasonable, null and void and in violation of the appellant's constitutional rights under the 14th amendment to the Constitution of the United States.

Appellant states that the whole record as filed is necessary for the consideration of the case and that the clerk may omit in printing the record such formal matters as appeal bonds, etc. which are not customarily printed.

J. Arthur Moran, Delavan, Wisconsin.

George S. Geffs, Jacob Geffs, & Eli Block of McGowan, Geffs, Geffs & Block, Janesville, Wisconsin, of Counsel, Attorneys for Appellant.

Due service admitted this the 10th day of August, 1950.
Harold E. Hanson, Attorney for Appellees.

Service admitted this 10th day of August, 1950.
Thomas E. Fairchild, Attorney General of Wisconsin, by Harold H. ——, Assistant Attorney General of Wisconsin.

[fol. 322a] [File endorsement omitted.]

[fol. 323] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. 258

ORDER NOTING PROBABLE JURISDICTION—October 16, 1950

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 258

DEAN MILK COMPANY, A CORPORATION,
Appellant,

vs.

CITY OF MADISON, WISCONSIN, A MUNICIPAL CORPORATION, DR. C. K. KINCAID, AS HEALTH COMMISSIONER FOR THE CITY OF MADISON, WISCONSIN, LEONARD HOWELL, AS CITY MANAGER OF THE CITY OF MADISON, WISCONSIN, AND THE COMMON COUNCIL OF THE CITY OF MADISON, WISCONSIN,
Appellees

STATEMENT AS TO JURISDICTION

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

J. ARTHUR MORAN,
GEORGE S. GEFFS,
JACOB GEFFS,
ELI BLOCK,
Counsel for Appellant.

INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Nature of the case the statutory provisions sustaining jurisdiction	1
State statute the validity of which is involved	12
Dates of judgments and appeals	13
Manner in which Federal question was raised	13
The Federal questions involved are substantial	16
Appendix "A"—Opinion of the Circuit Court of Dane County	33
Appendix "B"—Opinion of the Supreme Court of the State of Wisconsin	47
Appendix "C"—Preface of General Order 125 by the Wisconsin Department of Agriculture	53

Table of Cases Cited

Brimmer v. *Rebman*, 138 U. S. 78, 34 L. Ed. 862	24
Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, 281 U. S. 673, 50 S. Ct. 451	30
City of Wenoka v. *Rose Lawn Dairy* (Okla.), 212 P. (2d) 1056	26
Dean Milk Co. v. *City of Madison, Wis.*, —Wis. —, 43 N. W. (2d) 480 (June 30, 1950)	13
Dean Milk Co. v. *City of Waukegan* (1949 Ill.), 87 N. E. (2d) 751	26
Dyer v. *City Council of Beloit*, 250 Wis. 613, 27 N. W. (2d) 733	11, 16, 20
Dyer v. *City Council of the City of Beloit*, 68 S. Ct. 87	18
Dyer v. *City Council of Beloit*, 252 Wis. 249	19
Dyer v. *City Council of the City of Beloit*, 333 U. S. 825, 68 S. Ct. 450	18
Fiske v. *State of Kansas*, 274 U. S. 380, 47 S. Ct. 655	30
Freeman v. *Hewit* (U. S.), 67 Sup. Ct. 274, 276	24
Grant v. *Leavell*, 259 Ky. 267, 82 S. W. (2d) 283	26
Higgins v. *City of Galesburg* (Ill.), 81 N. W. (2d) 520	26

Page

H. P. Hood & Sons v. *DeMond*, 326 U. S. 525, 69 S. Ct. 657 22
Home Ins. Co. of New York v. *Morse*, 22 Wallace 445, 22 S. Ct. 365 31
John P. King Mfg. Co. v. *City Council of Augusta*, 227 U. S. 100, 48 Sup. Ct. 489, 72 L. Ed. 801 13
LaFranchi v. *City of Santa Rosa*, 8 Cal. (2d) 331, 65 P. (2d) 1301 25
Meridian v. *Sippy*, 54 Cal. App. (2d) 214, 128 P. (2d) 884 25
Miller v. *Williams*, 12 Fed. Supp. 236 26
Moultrie Milk Shed Inc. v. *Cairo* (Ga. 1950), 57 S. E. (2d) 199 27
Opinions of the Attorney General of Michigan, *Biennial Report of the Attorney General*, 47-48, No. 0-5105, Nov. 6th, 1946 26
Prescott v. *City of Borger* (Tex.), 158 S. W. (2d) 578 26
Sheffield Farms Co., Inc. v. *Seaman*, 114 N. J. L. 455 177A, 372 25
State ex rel. Larson v. *City of Minneapolis*, 190 Minn. 138, 251 N. W. 121 25
State of Minnesota v. *Barber*, 136 U. S. 313, 34 L. Ed. 455 24
Urban v. *Taylor* (N. J.), 188 Atl. 232 26

STATUTES CITED

Constitution of the United States:
Section 8 of Article I 6, 12, 14
Fourteenth Amendment 7, 12, 14
Act of June 25, 1948 (c) 646; 62 Stats. 929, 28 U. S. C. A., Sec. 1257(2) 1, 31
Ordinances of the City of Madison:
Sec. 7.11 4, 5, 7, 8, 12, 13, 21
Sec. 7.21 4, 8, 13
Wisconsin Statutes:
Sec. 269.56 3, 28
Sec. 328.021 21

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 258

DEAN MILK COMPANY, A CORPORATION,
Appellant,

vs.

CITY OF MADISON, WISCONSIN, A MUNICIPAL CORPORATION, DR. C. K. KINCAID, AS HEALTH COMMISSIONER FOR THE CITY OF MADISON, WISCONSIN, LEONARD HOWELL, AS CITY MANAGER OF THE CITY OF MADISON, WISCONSIN, AND THE COMMON COUNCIL OF THE CITY OF MADISON, WISCONSIN,
Appellees

STATEMENT AS TO JURISDICTION

MAY IT PLEASE THE COURT:

I. Nature of Case and Statutory Provisions Sustaining Jurisdiction

This is an appeal under the Act of June 25th, 1948, C. 646, 62 Stat. 929 of the Judicial Code, 28 U. S. C. A. Sec. 1257 (2), from a final judgment of the Supreme Court of Wisconsin entered the 30th day of June, 1950. The

above cited Judicial Code provides that a final judgment rendered in the highest court of a state in which a decision could be had, may be reversed by the Supreme Court as follows:

> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon appeal."

The facts from which the case arises may be briefly stated as follows:

On March 8th, 1948, plaintiff, which is engaged in the distribution of Grade A pasteurized milk and milk products in Chicago and other communities of Illinois and Southern Wisconsin, including Dane County, Wisconsin, applied to the City of Madison for a license to sell its Grade A pasteurized milk and milk products within the city. (R. 53). On March 12th, 1948, its application was denied, because the plaintiff's pasteurization plant was located in Chemung, Illinois, more than five miles from the central portion of the City of Madison, otherwise known as Capitol Square, and at a distance of about seventy-five miles from Madison. (R. 53). At that time, the City of Ordinance of Madison provided that:

> "It shall be unlawful for any person, association or corporation to sell, offer for sale or have in his or its possession with intent to sell or deliver in the City of Madison, any milk, cream or milk products as pasteurized unless the same shall have been pasteurized and bottled in the manner hereinafter provided within a radius of five miles from the central portion of the City of Madison, otherwise known as the Capitol Square, at a plant the machinery, equipment and facilities of which

shall have been approved by the Health Department." (R. 52).

There was no limitation in the Madison Ordinance on March 8th, 1948, as to the location of farms producing the milk.

On November 20th, 1948, plaintiff commenced its action for declaratory relief under Sec. 269.56 of the Wisconsin Statutes, alleging in its complaint the five mile limitation above set forth; that it was engaged in the pasteurization and sale of Grade A milk and milk products; that it had applied for a license to sell pasteurized Grade A milk and milk products on March 8th, 1948; that its application was denied because of the five mile limitation in the City Milk Ordinance; that the production, pasteurization and transportation of its milk met all the requirements of the Madison Ordinance except it was not pasteurized within five miles of Madison; that the five mile limitation was in violation of the Interstate Commerce Clause and the Fourteenth Amendment to the United States Constitution; that it had repeatedly urged the city to repeal the five-mile limitation, but that Madison had refused to do so; that a controversy existed between the plaintiff and the defendants; that it was necessary for the protection of its rights to secure a declaratory judgment under Sec. 269.56 of the Wisconsin Statutes, and prayed that the five-mile limitation be declared unconstitutional and for a full and complete determination of its claims and demands set forth in the complaint.

Defendants answered admitting that there was a controversy as to the constitutionality of the five-mile limitation, and alleging that the plaintiff obtained its milk from two hundred or more farms located chiefly in Illinois, and that it was impractical, and would place too heavy a burden upon the Madison Health Department to inspect farms from

which the plaintiff obtained its source of milk. (R. 199-236, 203, 206).

While that suit was pending, the City of Madison adopted a new milk ordinance on August 27th, 1949. This new Ordinance contained the five-mile limitation in Sec. 7.21 which reads:

> "It shall be unlawful for any person, association or corporation to sell, offer for sale or have in his or its possession with intent to sell or deliver in the City of Madison, any milk, cream or milk products as pasteurized unless the same shall have been pasteurized and bottled in the manner herein provided within a radius of five miles from the central portion of the City of Madison otherwise known as the Capital Square, at a plant housing the machinery, equipment and facilities, all of which shall have been approved by the Department of Public Health." (R. 270).

The new Ordinance of August 27th, 1949 added a new limitation of twenty-five miles upon the location of farms producing milk for the City of Madison. Sec. 7.11 reads as follows:

> "It shall be unlawful for any person to bring into or receive into the City of Madison, Wisconsin, or its police jurisdiction, for sale, or to sell, or offer for sale therein, or to have in storage where milk or milk products are sold or served, any milk or milk product as defined in this ordinance from a source not possessing a permit from the Health Commissioner of the City of Madison, Wisconsin."
>
> "Only a person who complies with the requirements of this ordinance shall be entitled to receive and retain such a permit."
>
> "On the filing of an application for a permit with the Health Commissioner he shall cause the source of supply named therein to be inspected and shall cause all other necessary inspections and investigations to be made. The Health Department shall not be obli-

> gated to inspect and issue permits to farms located beyond twenty-five (25) miles from the central portion of the City of Madison, otherwise known as the Capitol Square. * * *" (R. 245-246).

The appellant-plaintiff filed an amended complaint alleging that a controversy existed as to this twenty-five mile limitation and prayed to have it declared in violation of the Interstate Commerce Clause and the Fourteenth Amendment to the Constitution of the United States.

The defendants secured an order to show cause why all reference to Sec. 7.11 of the new Madison City Ordinance (the twenty-five mile limitation) should not be stricken from the appellant's (plaintiff's) amended complaint.

The trial court denied this order to show cause, and ordered the plaintiff to file a second amended complaint separating its allegations as to the respective sections of the milk ordinance involved, and alleging the unconstitutionality of the five-mile limitation in one count, and the unconstitutionality of the twenty-five mile limitation in the second count.

The plaintiff did this and filed its second amended complaint. The second amended complaint contained the allegations of the original complaint, alleging that the plaintiff's milk complied with the requirements of the present Madison Ordinance, except that it was not pasteurized within five miles of Madison; that it would be useless for the plaintiff to make application under the new Ordinance because the defendants took the position that they were not obligated to inspect the plaintiff's plant and issue it a license because its pasteurization plant was not located within the five-mile zone; that the plaintiff's milk and milk products were wholesome and Grade A, as provided in the United States Model Milk Ordinance promulgated by the United States Public Health Service; that it was inspected

regularly by the inspectors of the Chicago Board of Health; that it fully complied with the Chicago Milk Ordinance; that the Chicago Ordinance was equivalent to that of the Madison Milk Ordinance; that although the plaintiff made application on March 8th, 1948, the defendants have made no attempt to inspect the said farms from which the plaintiff obtains milk, or to inspect its plant or the vehicles in which said milk is transported, and have made no attempt to satisfy themselves that said milk was produced, pasteurized and transported pursuant to the provisions of the City Ordinance of the City of Chicago, which is equivalent to the Madison Ordinance; that the defendants have taken no steps whatever to satisfy themselves as to the purity, quality and sanitation of the plaintiff's milk, and does not propose to do so, and claim that they have the right to refuse to do so, and thus bar the plaintiff from selling milk in the City of Madison, Wisconsin, solely because the plaintiff's milk is not pasteurized within the five-mile zone; and that the provision of the City Ordinance prohibiting the sale of all milk not pasteurized within the five-mile zone was in violation of Sec. 8, Article I of the Constitution of the United States, commonly called the Interstate Commerce Clause, and in violation of the Fourteenth Amendment to the Constitution of the United States, in that it deprived the plaintiff of its property without due process of law; deprived it of the equal protection of the law; and deprived it of its right to contract without due process of law; and prayed that this section of the Madison Milk Ordinance be declared null and void, and unconstitutional.

The second count of the plaintiff's complaint adopted principally the allegations of the first count; alleged that the defendants' original answer set forth as an excuse for denying the plaintiff's right to sell pasteurized Grade A

milk and milk products in the City of Madison the fact that the farms from which the plaintiff obtained its milk were located in Northern Illinois and Southern Wisconsin more than twenty-five miles from the City of Madison, Wisconsin, alleged that Sec. 7.11 of the Madison Ordinance provided that the Health Department of the City of Madison was not obligated to inspect farms and to issue permits to farms located more than twenty-five miles from the central portion of Madison, Wisconsin; alleged that the plaintiff obtained its milk from approximately 900 farms located in Northern Illinois and Southern Wisconsin at distances between forty and one hundred twenty-five miles from Madison, Wisconsin; that the plaintiff did not own any of those farms; that the defendants took the position that they had a discretion as to inspection of farms located more than twenty-five miles from the City of Madison, and claimed the right to bar the sale of plaintiff's milk because of that fact; and that the said section of the City Ordinance unlawfully restricts, limits and prohibits the plaintiff from selling its milk and milk products in the City of Madison, Wisconsin; that said section of the City Ordinance is unconstitutional, being a violation of the Fourteenth Amendment to the United States Constitution, in that it deprives the plaintiff of its right to contract, its rights to property, and denies this plaintiff the equal protection of the law; and denies to the plaintiff the right to transact a lawful business, and violates the Interstate Commerce Clause of the United States Constitution. The second count further alleged on information and belief that the City Health Department would refuse to inspect any of the farms from which the plaintiff obtained its milk, even though the owners of said farms made application to the Health Department, and that there existed a controversy between the plaintiff and the defendants as to the validity of Sec. 7.11

of the Madison Milk Ordinance, and that it was necessary for the rights of the plaintiff to be declared under Sec. 269.56 of the Wisconsin Statutes; the plaintiff prayed for a declaratory judgment declaring that section unconstitutional, and for a declaration that the defendants have not the right to restrict, prohibit or prevent the plaintiff from selling its milk or milk products in the City of Madison, Wisconsin, by virtue of Sec. 7.11 of said Ordinance.

The defendants answered the second amended complaint, and in answer to the first count, alleged that Sec. 7.21, being the five-mile limitation, was constitutional and a necessary health measure; that the City of Madison was located in Dane County, Wisconsin, which is the greatest milk producing area in the United States, and that there was ample milk supplies for the City of Madison within the limits prescribed by the Ordinance.

The defendants answered the second count and alleged:

> "The defendants admit that they take the position that the Madison Health Department has a discretion as to the inspection of farms located more than 25 miles from Madison and the issuance of permits to such farms and that it has the right to deny the issuance of permits to such farms and to deny plaintiff the right to sell its milk products made from milk produced on such farms, in the City of Madison and also for other reasons. The defendants deny that the said Ordinance or any part of it is in violation of the Constitution of the United States or any amendment thereto or of any provision of the Constitution of the State of Wisconsin."
>
> "Defendants deny that any action in refusing permits to such farms or to inspect such farms would be arbitrary, discriminatory or unreasonable * * *."
>
> "Defendants allege that in view of the great supply of milk available within a radius of 25 miles from the Capitol Square of the City of Madison, the provision

of the Madison Ordinance that the City need not inspect or issue permits to farms located beyond that radius is entirely reasonable and a proper health regulation and that said provision aids the effectiveness of inspection by the City Health Department and minimizes the cost thereof to the City and its tax payers.

"So long as the five mile pasteurization limit contained in Section 7.21 of the present Madison Ordinances remains in effect, these defendants deny that there is any controversy between the parties as to the validity of the provisions of Section 7.11 of the Ordinances complained of by plaintiff in its second cause of action because at no time has the plaintiff given any indication that it proposes to pasteurize its milk within the said five mile limit or at any other place in the State of Wisconsin; hence so long as the provisions of Section 7.21 of the Madison Ordinance are in effect there is no necessity for the rights of the plaintiff to be declared under Section 7.11 of the Madison Ordinances."

Trial was before the Court without a jury. Appellant's testimony shows that Dean's pasteurization plants were located at Chemung and Huntley, Illinois, which are located respectively sixty-five and eighty-five miles from Madison, Wisconsin (R. 84); that milk from the Dean pasteurization plants is sold in the City of Chicago, Illinois, surrounding municipalities of Chicago, Illinois, and cities of Northern Illinois and Southern Wisconsin, including eighteen cities and villages of Dane County, Wisconsin. (R. 312, 103). These cities require inspection of the farms where the milk is produced, of the pasteurization plants and of the facilities of transportation. The City of Chicago, Illinois, operates under a Milk Ordinance which is equivalent to the United States Model Milk Ordinance formulated by the Public Health Service of the United States, and the Chicago Milk Shed has a rating of better than 90%. (R.

313, 195-196, 198-199). The United States Model Milk Ordinance was formulated by the Public Health Service of the United States, and is recommended to the cities throughout the United States for adoption. Over two thousand cities have adopted it, and Sec. 11 of the Model Milk Ordinance provides for reciprocal inspection between the various milk sheds; that is, milk produced beyond the limits of routine inspection of the receiving city may be received from a milk shed which has been awarded by the State Control Agency a rating of 90% or more on the basis of the United States Public Health Service rating method. (R. 62-64). The revised Milk Ordinance recommended by the United States Public Health Service in Sec. 11 makes the same provision. (R. 64). The Chicago Milk Shed, where the Dean Milk is produced and pasteurized, has a rating of better than 90% for both the farms and pasteurization plants. (R. 195, 198).

Appellant's witnesses H. J. Burger, Milk Sanitarian for Janesville, Wisconsin, Dr. Fred B. Welch, Health Officer for Janesville, Wisconsin, James H. Davis and Dr. W. C. Corbett, all experts in the field of milk production, pasteurization and distribution, all testified that both the five-mile and the twenty-five mile limitations were not health measures, and were not necessary to insure a city of supply of pure, wholesome, fresh milk.

Dr. C. K. Kincaid, the chief health officer of Madison, Wisconsin, and one of the appellees, testified that in his judgment the reciprocal provision provided for in Sec. 11 of the United States Model Milk Ordinance would adequately safeguard the purity and sanitation of the milk to the consumers in Madison. (R. 62-67).

Clarence Luchterhand, milk sanitarian for the Wisconsin State Board of Health, and a witness for the appellees,

testified that the State Board of Health recommended the United States Model Milk Ordinance to the cities of Wisconsin, and that a municipality in receiving milk from distant points may safely rely upon a rating of 90% or more made by the United States Public Health Service; that the Wisconsin State Board of Health had received rating from the Chicago Milk Shed, and it showed for raw milk sold to plants, 91.05%; pasteurization plants, 93.42%, and an average of 92.34% and that those ratings were satisfactory. (R. 150-151).

The regulations provided by the United States Model Milk Ordinance in regard to sanitation, quality and wholesomeness of milk are as stringent as the recommendations of the present Madison Milk Ordinance. In addition, the Dean Milk Company has inspectors of its own that make periodical inspection of the farms where the milk is produced, of the pasteurization plant, and the facilities of transportation. (R. 81-84, 97-102).

The Circuit Court of Dane County found that the five-mile limitation was constitutional, and a reasonable health regulation, that the five-mile limitation did not violate the Interstate Commerce Clause of the Fourteenth Amendment to the Constitution of the United States. The trial court based its decision solely upon the decision of the Supreme Court of Wisconsin in the case of *Dyer* v. *City Council of Beloit*, 250 Wis. 613, 27 N. W. (2d), 733.

As to the twenty-five mile limitation, the trial court held:

> "Dean Milk Company need not be concerned by where its farmer patrons live, so long as Dean is not pasteurizing, and has expressed no intent to pasteurize, within five miles of Madison. The question is completely academic and moot as to where Dean's milk comes from, if Dean is not going to sell in Madison—and Dean cannot sell in Madison without pasteurizing

inside the five-mile limit, if Madison's five-mile pasteurization ordinance is valid—and we hereby hold it to be valid." (R. 18).

The Circuit Court of Dane County further held that it was not necessary for the court to pass upon the twenty-five mile limitation, because the Dean Milk Company was not a farmer, owned no farms, and the farmers from whom it purchased its milk were not parties to this action. (R. 17).

On appeal the Supreme Court of the State of Wisconsin on June 30th, 1950, entered judgment affirming the decision of the lower court, Justice Hughes dissenting.

II. State Statute, the Validity of Which Is Involved

There was drawn in question in this case the validity, under Section 8 of Article I and the Fourteenth Amendment of the Constitution of the United States of the respective sections of the Madison Milk Ordinance, to-wit:

Section 7.11 of the Madison Milk Ordinance:

"It shall be unlawful for any person to bring into or receive into the City of Madison, Wisconsin, or its police jurisdiction, for sale, or to sell, or offer for sale therein, or to have in storage where milk or milk products are sold or served, any milk or milk product as defined in this ordinance from a source not possessing a permit from the Health Commissioner of the City of Madison, Wisconsin."

"Only a person who complies with the requirements of this ordinance shall be entitled to receive and retain such a permit."

"On the filing of an application for a permit with the Health Commissioner he shall cause the source of supply named therein to be inspected and shall cause all other necessary inspections and investigations to be made. The Health Department shall not be obligated to inspect and issue permits to farms located beyond twenty-five (25) miles from the central portion

of the City of Madison, otherwise known as the Capitol Square. * * *"

Section 7.21:—

"It shall be unlawful for any person, association or corporation to sell, offer for sale or have in his or its possession with intent to sell or deliver in the City of Madison, any milk, cream, or milk products as pasteurized unless the same shall have been pasteurized and bottled in the manner herein provided within a radius of five miles from the central portion of the City of Madison otherwise known as the Capitol Square, at a plant housing the machinery, equipment and facilities, all of which shall have been approved by the Department of Public Health."

The City Ordinance is a statute within the meaning of the Judicial Code for the purpose of appeal to this Court. *John P. King Mfg. Co.* v. *City Council of Augusta,* et al. (277 U. S. 100), 48 S. Ct. 489, 72 L. Ed. 801.

III. Dates of Judgment and Appeal

The final judgment of the Supreme Court of Wisconsin, affirming the judgment of the Circuit Court of Dane County, Wisconsin, holding Sec. 7.21 of the Madison City Ordinance valid, and that Sec. 7.11 presented only a moot question so long as 7.21 was a valid enactment, was entered on June 30th, 1950. *Dean Milk Company, a corporation,* v. *City of Madison, Wisconsin, a municipal corporation,* et al. —— Wis. —, 43 N.W. 2nd 480. (June 30, 1950.)

Petition for appeal to this Court was presented to the Hon. Timothy Brown, Acting Chief Justice of the Supreme Court of Wisconsin, on July 25th, 1950, and was by him allowed the same day.

V. Manner in Which Federal Question Was Raised

The Federal questions in this case were raised at the outset and urged throughout all the proceedings in the

state courts. The action was started by a summons and complaint in the Circuit Court for Dane County, Wisconsin, for a declaratory judgment to have these respective sections of the Madison Milk Ordinance declared in violation of Sec. 8 of Article I and the Fourteenth Amendment to the Constitution of the United States. The second amended complaint alleged, among other things, that the City of Madison denied the appellant the right to sell Grade A pasteurized milk and milk products within the City of Madison on the ground that appellant's pasteurization plant was not located within five miles from the Capitol Square of the City of Madison, Wisconsin, and in the second count alleged that the City of Madison denied the appellant the right to sell Grade A pasteurized milk and milk products in the City of Madison because the farms from which it obtained its milk were located more than twenty-five miles from the Capitol Square of Madison, Wisconsin, and that the action of the city in refusing to grant the appellant a license was arbitrary and unreasonable; that the above quoted provisions of the City Ordinance were unconstitutional, deprived the appellant of his property and right of contract, without due process of law, denied the appellant the equal protection of the law within the meaning of the Fourteenth Amendment to the Constitution of the United States, and constituted an illegal interference with Interstate Commerce. (R. 19-33).

The trial court states in its opinion:

> "Plaintiff seeks a declaratory judgment as to the constitutionality of the Madison Milk Ordinances, which provide:
>
> "(1) No milk shall be sold as pasteurized milk in the City of Madison unless it has been pasteurized and bottled within a radius of five miles from the Capitol Square."

"(2) The Health Department shall not be 'obligated' to inspect and issue permits to farms located more than twenty-five miles from the Capitol Square, as to raw milk to be delivered to pasteurization plants for sale in Madison."

"The Madison Ordinance, as adopted August 27th, 1949, contains the five mile and twenty-five mile provisions in sections 7.21 and 7.11, respectively, as follows:— * * *"

"This Court's duty is to decide upon constitutionality * * *."

"The constitutional question still is: Can Madison or Chicago or Hollywood or Schenectady provide that milk sold in its city must have been pasteurized within five miles of the center of the city and that farms more than twenty-five miles from the city need not be inspected (in effect, may not be eligible for a 'permit' to sell raw milk to pasteurization plants serving the city)?" * * *

"Is Madison's five mile pasteurization ordinance constitutional? It is." * * *

"Dean Milk Company need not be concerned by where its farmer patrons live, so long as Dean is not pasteurizing, and has expressed no intent to pasteurize, within five miles of Madison. The question is completely academic and moot as to where Dean's milk comes from, if Dean is not going to sell in Madison—and Dean cannot sell in Madison without pasteurizing inside the five mile limit, if Madison's five mile pasteurization ordinance is valid—and we hereby hold it to be valid." (R. 1-2, 5, 6, 18).

The opinion of the Supreme Court of Wisconsin appended to this statement shows that Federal questions were presented to, considered and decided by it:

"This is an action by Dean Milk Company, an Illinois corporation, against the City of Madison, Dr. C. K. Kincaid, its Health Commissioner, Leonard Howell, its City Manager, and its Common Council,

for a declaratory judgment as to the constitutionality of two sections of the Milk Ordinance of the said city providing substantially as follows:

"(1) No milk shall be sold as pasteurized milk in the City of Madison unless it has been pasteurized and bottled within a radius of five miles from the Capitol Square.

"(2) The Health Department shall not be 'obligated' to inspect and issue permits to farms supplying raw milk for sale in said City if said farms are located beyond twenty-five miles from the Capitol Square." (R. 311).

"The plaintiff contends that its inspection, with that of the Chicago Board of Health, and spot checks by the United States Public Health Service, result in a product that is clean, pure and wholesome, and that it should be permitted to flow freely to market unburdened by duplication of inspection and that the restrictions in the Madison Milk Ordinance are prohibitive trade barriers and therefore unconstitutional under the Fourteenth Amendment and the Interstate Commerce Clause of the United States Constitution. The courts of some states have so held. This court has held otherwise in *Dyer v. City Council of Beloit*, 250 Wis. 613, 27 N.W. (2d.) 733, in which it held valid an ordinance of the city of Beloit which contained the following provision:

"'No pasteurized milk shall be sold in the city of Beloit which shall not have been pasteurized in approved plants within six miles from the intersection of State Street and East Grand Avenue in the city of Beloit.'" (R. 314).

V. Question Involved Is Substantial

In the case of *Dyer* v. *Common Council of the City of Beloit, et al.*, 250 Wis. 613, 27 N.W. (2d), 733, the Supreme

Court of Wisconsin held constitutional a provision of the Beloit Milk Ordinance which provided:—

> "No pasteurized milk shall be sold in the city of Beloit which shall not have been pasteurized in approved plants within six miles from the intersection of State Street and East Grand Avenue in the city of Beloit."

That was the first time in the judicial history of this country that a state or Federal court of last resort had declared that a municipality might arbitrarily restrict and limit the production and sale of any wholesome food to such surrounding territory as the municipality deemed capable of producing and processing the necessary amount to supply its population.

The doctrine of that case was stated in the following portions of the opinion:—

> "It cannot be said that the city, in adopting the section in dispute, arbitrarily acted on the question of convenience, efficiency, and cost of inspection, unless we adopt the rule in the case of *Meridian v. Sippy*, 54 Cal. App. (2d) 214, 128, Pac. (2d) 884, where the court said *that milk production is a legitimate business and so long as persons engaged in the business put out a clean, pure and wholesome product it should be permitted to flow freely on the markets, unburdened by duplication of inspection and prohibitive trade barriers, which rule we do not adopt.*"
>
> "* * * Every ordinance must stand or fall upon its own merits. It is either reasonable or arbitrary in accordance with the facts and purposes it is intended to serve, if within the police powers of the municipality adopting it. *The area necessary to be included in the ordinance could well depend upon the population to be served, the amount of milk produced, and the location of the pasteurization plants with reference to the population to be served.* A reasonable exercise of

police power is not a trade barrier, and contract rights guaranteed under the Fourteenth Amendment of the federal constitution do not have a superior right to the right of a municipality to reasonably protect the health of its citizens."

"This ordinance does not violate the interstate commerce clause of the United States constitution. Milk may be furnished from farms and pasteurization plants in the state of Illinois as well as in the state of Wisconsin, and in fact milk is so furnished. The production and delivery of milk are essentially local problems with which congress has not sought to deal, leaving the city of Beloit free to act in the exercise of its police powers * * *."

The *Dean* v. *City of Beloit* case was appealed to this court, and this court noted probable jurisdiction. *Lawrence Dyer* v. *City Council of the City of Beloit, et al.*, 68 S. Ct. page 87 (October 13th, 1947). Before the case was heard, however, the City of Beloit confessed error, amended its Ordinance and gave Dyer a milk license, and moved to have the case dismissed as being moot. This motion was opposed by Dyer on the ground that it would leave standing the decision of the Supreme Court of the State of Wisconsin, and that under that decision the City of Beloit was left free to re-enact the Ordinance in question.

This Court in *Dyer* v. *City Council of the City of Beloit, et al.*, (February 2nd, 1948), 333 U. S. 825, 68 S. Ct. 450, made the following order:

"On consideration of the motion of the appellees to dismiss, it appearing that the cause has become moot, the judgment of the supreme court of Wisconsin is vacated and the cause is remanded for such further proceedings as by that court may be deemed appropriate. Costs in this court may be taxed against the appellees."

When the case returned to the Supreme Court of Wisconsin, that Court on March 29th, 1948, proceeded to reverse the Circuit Court for Rock County, which originally it had affirmed in holding the Ordinance valid. We quote in its entirety the text of the Wisconsin Supreme Court in *Dyer* v. *City Council of Beloit*, 252 Wis. 249:

> "In this case, the court on June 10, 1947, affirmed a judgment of the circuit court dismissing the appellant's petition for a writ of mandamus to compel the city of Beloit to issue to the appellant a license as a milk distributor, and held a certain milk ordinance of the city constitutional. The case is originally reported in 250 Wis. 613, 27 N.W. (2d) 733. In proceedings on appeal to the United States supreme court, the respondents moved to dismiss the appeal on the ground that the case was moot, the respondents confessing error and setting forth that the city had amended the ordinance and issued a milk license to the appellant pursuant to the amended ordinance. The appellant opposed a dismissal of the appeal on the ground, among others, that a dismissal would result in permitting the judgment and decision of this court to stand as a valid judgment and decision holding the original ordinance constitutional and giving the city the right to reenact the original ordinance. The United States supreme court on February 2, 1948, entered a mandate providing in part: 'On consideration of the motion of the appellees to dismiss, it appearing that the cause has become moot, the judgment of the supreme court of Wisconsin is vacated and the cause is remanded for such further proceedings as by that court may be deemed appropriate.' 333 U. S. 825, 68 Sup. Ct. 450, 92 L. Ed. 0000 (Reporter.)
>
> "After the filing of the mandate of the United States supreme court in this court, the appellant on March 29, 1948, moved that the judgment of the circuit court be reversed and for other relief. After hearing counsel for the respondents as well as for the appellant, this

court on March 29, 1948, entered the following mandate:

> "By the Court:—'Judgment appealed from is reversed and cause remanded with direction to dismiss the complaint.'"

In the case at bar, the trial court holds the five-mile limitation valid on the ground that the original decision by the Supreme Court of Wisconsin in *Dyer* v. *City Council of the City of Beloit*, 250 Wis. 613, 27 N.W. (2d) 733, is still the law, (the opinion of the trial court being attached hereto and marked App. A.). This is affirmed by the supreme court of the State of Wisconsin in its opinion, which is attached hereto and marked App. B.

Both the trial court and the Supreme Court of Wisconsin took the position that the facts that the appellant's milk was adequately inspected by the municipalities where it was produced, and pasteurized, and that such inspection was evaluated and checked by the United States Public Health Service, were immaterial.

The supreme court of Wisconsin stated:

> "Plaintiff contends that it would be unnecessary to hire additional inspectors, and that Dr. Kincaid as health commissioner could satisfy himself as to the quality of plaintiff's product by relying upon the inspections already made of the farms and plants in Illinois. The trial court made this answer to that contention:
>
> > 'A city like Madison, in the interests of public health, is entitled to set up its own system of milk inspection, if it be a reasonable one. The city is not forced to rely upon inspection by some other governmental unit nor to submit to "reciprocal inspection" unless some higher authority properly decrees it.'

'One municipality does not have to sacrifice its standards to those of another community which may be lower nor is one governmental unit necessarily compelled to yield its independence to another, even though the latter's guages of inspection purport to be equal or slightly higher.'

'The city of Madison—in the public concern over health—has an autonomy, a measure of local self-government, which, if exercised reasonably, need give way only to a constitutional enactment by the legislature of Wisconsin or the Congress of the United States, if such exists. None such does exist as yet.'

"We agree with the trial court. * * *"' (R. 317).

This decision is made in the face of the testimony of Dr. C. K. Kincaid, the chief health officer of the city of Madison, who testified that reciprocal inspection method which the court condemns, provides an adequate and reasonable method to safeguard the milk of the receiving city. (R. 63-67).

General Order 125 of the Wisconsin State Department of Agriculture, effective November 15th, 1949, is entitled *"Standards and Regulations for the Production and Processing of Milk and Milk for Interstate Shipment."*

We set forth the provisions of this General Order as App. C, (the courts, including the Supreme Court of Wisconsin, are required to take judicial notice, Sec. 328.021 of the Wis. Stats.), and the preface sets forth that General Order 125 was prepared jointly by the State Department of Agriculture and the State Board of Health, and that it had been approved by the State Board of Health; that the regulations were equivalent to the Model Milk Ordinance promulgated by the United States Public Health Service, and that there would be continuous state inspec-

tion service by the Wisconsin State Department of Agriculture, and:

> "This inspection will be supplemented by the United States Public Health Service inspection to insure communities throughout the United States that when they buy Wisconsin Grade A milk, they are getting milk which meets every human health and sanitation requirement."

The emphasis of both the trial court and the Supreme Court of the fact that Dane County is a large milk producing county, and that it produces more than ten times the milk used in the city of Madison gives the key to the decision and the purpose of the Ordinance. The purpose of the Ordinance is economic protection, and these regulations are not health measures.

This Court stated in *H. B. Hood & Sons* v. *DuMond*, 336 U. S. 525, 531, 69 S. Ct. 657, at page 531-532:

> "Our decision in a milk litigation most relevant to the present controversy deals with the converse of the present situation. *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511, 55 S. Ct. 497, 79 L. Ed. 1032, 101 L.R.A. 55. In that case, New York placed conditions and limitations on the local sale of milk imported from Vermont designed in practical effect to exclude it, while here its order proposes to limit the local facilities for purchase of additional milk so as to withhold milk from export. The State agreed then, as now, that the Commerce Clause prohibits it from directly curtailing movement of milk into or out of the State. But in the earlier case, it contended that the same result could be accomplished by controlling delivery, bottling and sale after arrival, while here it says it can do so by curtailing facilities for its purchase and receipt before it is shipped out. In neither case is the measure supported by health or safety considerations but solely by protection of local economic interests, such as supply for local consumption and limitation of competi-

tion. This Court unanimously rejected the State's contention in the Seelig case and held that the Commerce Clause, even in the absence of congressional action, prohibits such regulations for such ends."

In the case at bar the City of Madison drew two circles around itself, and absolutely prohibited all commerce originating beyond the limits of the circles. The first circle has a radius of five miles from the center of the city, and declares that all milk not pasteurized within that radius is prohibited from being sold within the City of Madison. The second circle has a radius of twenty-five miles, and prohibits the sale of any milk in the City of Madison that is not produced on farms within that zone. It is true that as to the second circle, the City Ordinance purports to place a discretion in the Health Department by stating that the Health Department will not be obligated to inspect farms beyond the twenty-five mile limit, but the fact is that the Health Department will not inspect farms beyond the twenty-five mile limit, and milk which is obtained beyond that limitation cannot be sold in the City of Madison. The defendants state in their answer as follows:—

> "Defendants admit they have taken no steps to satisfy themselves as to the purity, quality or sanitation of the plaintiff's milk and further admit that they do not propose to do so and that they claim they have the right not to do so and further have the right to refuse to grant any license to the plaintiff because the plaintiff's milk is not pasteurized within the five mile zone as provided in the Madison City Ordinances, * * *." (R. 40-41).
>
> "Defendants deny that the health officer of the City of Madison could by any means other than continual inspection of the plaintiff's plants and of the several hundred farms which deliver to those plants satisfy himself that the plaintiff's milk is being produced, pasteurized and distributed in the manner required by

> the ordinances of the City of Madison, and defendants allege that such continual inspection would create undue expense and inconvenience to the City of Madison." (R. 42.)

The trial court made no finding that continual inspection by the City of Madison was necessary to insure the purity and sanitation of milk to be sold in Madison. The fact that Congress has not passed regulatory legislation does not save these restrictive provisions of the Madison Ordinance from the Commerce Clause. *Freeman* v. *Hewitt*, 329 U. S. 249, 67 S. Ct. 274. *State of Minnesota* v. *Barber*, 136 U. S. 313, 34 L. Ed. 455. *Bremmer* v. *Rebman*, 138 U. S. 78, 34 L. Ed. 862. In the latter case, a statute prescribing a one hundred mile radius within which animals should be inspected before slaughter was held invalid.

The Madison Ordinance is in violation of the due process clause of the Fourteenth Amendment. The philosophy of the opinion of both the trial and Supreme Court of Wisconsin was that the City of Madison could make arrangements to inspect enough of the surrounding territory to supply it with milk, and prohibit entry of milk originating beyond the artificial lines prescribed by the Ordinance.

The philosophy, in substance, of both the trial and the Supreme Court of Wisconsin is that the city under the due process clause may deal with as many milk dealers as the city deems necessary to supply the local population by enlarging or constricting the circle to whatever size it deems necessary, and refusing a license to all others. Assuming that such an Ordinance is made in good faith, that will not save it from the due process clause.

In *State of Minn.* v. *Barber*, 136 U. S. 313, 34 L.E. 455, the Court stated:—

> "The presumption that this Statute was enacted in good faith for the purpose expressed in the title,

> namely, to protect the health of the people of Minnesota, cannot control the final determination of the question whether it is not repugnant to the constitution of the United States. There may be no purpose upon the part of the Legislature to violate the provisions of that instrument, and yet a statute enacted by it under the forms of law be destructive of rights granted or secured by the Constitution. In such cases the courts must sustain the supreme law of the land by declaring the Statute unconstitutional and void."

The *Supreme Court of New Jersey in Sheffield Farms Co. Inc.*, v. *Seaman*, 114 N.J.L. 455, 177A, 372, held such an ordinance to be unconstitutional, stating:—

> "The city just took the position that it had enough milk dealers, and that it had the situation well in hand. Such a position is unreasonable, it is arbitrary, capricious and discriminatory. It unlawfully curtails prosecutor's common-law right to engage in a lawful business, notwithstanding that it has fully complied with the requirements of the state and city. This the city cannot lawfully do."

The following cases have held that an Ordinance requiring the pasteurization plant to be located within the city limits is unconstitutional: *State ex rel Larson* v. *City of Minneapolis*, 190 Minn. 138, 251 N.W. 121; *La Franchi* v. *City of Santa Rosa*, 8 Cal. (2d) 331, 65 Pac. (2d) 301.

The following cases held city Ordinances which prescribed that the pasteurization plant should be located within the boundaries of the county in which the city was located, invalid, as a violation of due process: *Meridian* v. *Sippy*, 54 Cal. App. (2d) 214, 128 P. (2d) 884. At page 888 the Court stated:—

> "Any Ordinance or Statute which prevents any person from engaging in a lawful business cannot be upheld unless protection of life, health or property makes

it reasonably necessary. Such is not the case here. The contention of respondent, if approved, might result in the erection of trade barriers that would affect the economic prosperity of the whole state."

Grant v. *Leavell*, 259 Ky. 267, 82 S.W. (2d) 283; *Prescott* v. *City of Borger* (Tex. App.) 158 S.W. (2d) 578.

Dean Milk Company v. *City of Waukegan* (1949, Ill.) 87 N.E. (2d) 751, held unconstitutional an Ordinance which barred the sale of milk in Waukegan which was not pasteurized and produced in Lake County, Illinois.

Higgins v. *City of Galesburg (Ill.)*, 81 N.E. (2d) 520, held unconstitutional a City Ordinance which barred the sale of milk not pasteurized within ten miles of the City of Galesburg.

Miller v. *Williams*, 12 Fed. Supp. 236, held unconstitutional a regulation of the Health Commissioner of the City of Baltimore which prohibited the use or sale of cream for the manufacture of ice cream by dairies situated more than fifty miles from the city limits.

The case of *Urban* v. *Taylor*, (N.J.) 188 Atl. 232, held that the excuse that there was sufficient milk within the neighborhood, and that it was too expensive and inconvenient to inspect farms further away, would not stand the test of due process.

Opinions of the Attorney General of Michigan, Biennial Report of the Attorney General, 47-48, No. 0-5105, Nov. 6, 1946, holds that a City Ordinance providing that no license shall be granted to a milk producer whose dairy farm is more than thirty miles from the city of Midland, and whose plant is located outside of the city, is violative of the constitutional rights of property and contract of a dealer whose plant is located outside of the city. It is further discriminatory and invalid.

In the case of *City of Wewoka* v. *Rose Lawn Dairy* (Okla.),

212 P. (2d) 1056, the Court held that when the applicant's milk comes from a milk shed with a United States Public Health Service rating of 90 percent or more, that it is arbitrary for the health officer to bar the milk upon the excuse that he hasn't the funds or the time to inspect the milk at its sources.

Moultrie Milk Shed Inc. v. *Cairo*, (Ga. 1950) 57 S.E. (2d) 199, holds unconstitutional and unreasonable a City Ordinance which prohibited the sale of milk which is not pasteurized in the county.

There are no decisions of any court of last resort in this country outside of the above decision of the Supreme Court of Wisconsin that sustain the validity of similar Ordinances.

The position of the trial court and of the Supreme Court that the appellant cannot have his rights adjudicated as to the twenty-five mile limitation because of the facts (1) that the question is moot so long as the five-mile limitation is valid, and (2) that the 950 various farmers which the appellant purchases its milk from in Northern Illinois and Southern Wisconsin are not party plaintiffs, violates the due process clause of the Fourteenth Amendment and denies to the appellant the equal protection of the law, because it virtually and in fact denies the appellant access to the courts of Wisconsin to have its rights adjudicated therein. The appellant purchases milk from approximately 950 farms. This milk is delivered to the appellant's pasteurization plants, is paid for and becomes the property of the appellant. None of these 950 farmers are selling milk or proposing to sell milk in the City of Madison. They sell their milk to the Dean Milk Company, and they have no further voice in the matter as to what becomes of the milk after that.

Sec. 7.11 of the Madison Milk Ordinance prohibits the

Dean Milk Company from selling milk in the City of Madison. It provides that:

> "It shall be unlawful for any person to bring into or receive into the City of Madison, Wisconsin * * * "for sale or to sell or offer for sale therein or to have in storage where milk or milk products are sold or served, any milk or milk product as defined in this Ordinance from a source not possessing a permit from the Health Commissioner of the City of Madison, Wisconsin."

This section further provides that:

> "The Health Department shall not be obligated to inspect the farms and issue a permit to farms located more than twenty-five miles away."

This paragraph certainly means what it says, that the Dean Milk Company is prohibited from selling milk in the City of Madison, because the source of its milk is produced on farms that do not have permits. The section further provides that the Health Department will not be obligated to inspect and issue permits to farms more than twenty-five miles away. All of the farms from which the Dean Milk Company obtains its milk are more than twenty-five miles away, and as above quoted from the appellees' answer, the appellees will not inspect farms located more than twenty-five miles away, and in fact refuses to even furnish the plaintiff with the applications provided for in this section of the Ordinance. (R. 312-313.)

Sec. 269.56 of the Wisconsin Statutes is the Uniform Declaratory Judgment Act, and provides as follows:—

> (1) "Courts of record * * * shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. * * * and such declaration shall have the force and effect of a final judgment or decree.

(2) "Any person * * * whose rights, status or other legal relations are affected by a * * * municipal ordinance * * * may have determined any question of * * * validity arising under the * * * ordinance * * * and obtain a declaration of rights, status or other legal relations thereunder.

(11) "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the right of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the attorney general of the state shall also be served with a copy of the proceeding and be entitled to be heard."

The appellant having applied for a license to sell its milk in the City of Madison, and having been denied the right on the excuse that its milk was not pasteurized within five miles of the City of Madison, and that its milk came from sources more than twenty-five miles away from the City of Madison, was entitled under this statute to have an adjudication of its rights, and a denial thereof is a denial of due process, and of the equal protection of the law, because it in fact denies the appellant access to the courts of Wisconsin.

Assuming that the appellant did persuade 950 farms in Northern Illinois and Southern Wisconsin to start law suits in the City of Madison attacking the validity of the twenty-five mile limitation, the Wisconsin courts would refuse to pass upon the validity of the twenty-five mile limitation because the trial court plainly stated in his opinion, which is approved by the Supreme Court, that so long as the Dean Milk Company was not going to

pasteurize within the five-mile zone, then the twenty-five mile question was moot.

How would the 950 farmers have any standing in the Wisconsin courts anyway, because they do not propose to sell milk in Madison? They sell their milk to the Dean Milk Company and lose all title to the milk after it is sold to the Dean Milk Company. It is the Dean Milk Company that proposes to sell milk in the City of Madison.

The decision compelling the appellant to submit to this section of the Ordinance, by refusing it a remedy, necessarily affirms the validity of this section as to appellant. *Fiske* v. *State of Kansas*, 274 U. S. 380, 47 S. Ct. 655.

This Court said in *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673, 50 S. Ct. 451 at page 453:

> "If the judgment is permitted to stand, deprivation of plaintiff's property is accomplished without its ever having had an opportunity to defend against the exaction. The state court refused to hear the plaintiff's complaint and denied it relief, not because of lack of power or because of any demerit in the complaint, but because assuming power and merit, the plaintiff did not first seek an administrative remedy which in fact was not available *and which is not now open to it*. Thus by denying to it the only remedy ever available for the enforcement of its right to prevent the seizure of its property, the judgment deprives the plaintiff of its property."

Applying this reasoning to the case at bar, the State of Wisconsin declines to declare the twenty-five mile limitation unconstitutional, not because of any demerit in the plaintiff's complaint, but because it says that the remedy is not available to the appellant, and that no remedy is now open to the appellant. If the appellant persuaded the 950 farmers to start their litigation, they would be turned out of court on the excuse that the five-mile limitation made the question moot anyway.

The Wisconsin courts have ample power under the declaratory judgment statute to give the appellant the relief that it is entitled to under the Constitution of the United States.

The *Brinkerhoff-Faris Trust & Savings Company* v. *Hill* opinion continues at page 454 as follows:

> "The Federal guarantee of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government. * * *
>
> "Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense—whether it has had an opportunity to present its case and be heard in its support. * * * whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right which the state has no power to destroy unless there is, or was, afforded to him some real opportunity to protect it."

Under the decision of the trial court, which is approved by the Supreme Court of Wisconsin, the appellant is denied all opportunity to have the twenty-five mile limitation declared unconstitutional and no opportunity is given to the appellant to protect its right in this matter.

In *Home Ins. Co. of N. Y.* v. *Morse*, 22 Wallace 445, 22 S. Ct. 365, at page 368:—

> "Every citizen is entitled to resort to all of the courts of the country, and to invoke the protection which all laws of all those courts may afford him. A man may not barter away his life or his freedom or his substantial rights."

VI. It is, therefore, respectfully submitted that this Court has jurisdiction of this appeal under the Act of June 25th, 1948 (c) 646, 62 Stats. 929, 28 U. S. C. A. Sec. 1257.

The opinion of the trial court is attached hereto and marked Appendix A. The opinion of the Supreme Court of Wisconsin is attached and marked Appendix B, and preface of the General Order 125 of the Wisconsin State Department of Agriculture is attached hereto and marked Appendix C.

J. Arthur Moran,
Attorney for Appellant,
Delavan, Wis.

George S. Geffs, Jacob Geffs & Eli Block,
Janesville, Wis.,
Of Counsel.

APPENDIX "A"

IN CIRCUIT COURT OF THE STATE OF WISCONSIN FOR DANE COUNTY

DEAN MILK COMPANY, a Corporation, Plaintiff,

vs.

CITY OF MADISON, WISCONSIN, a Municipal Corporation; DR. C. K. KINCAID, as Health Commissioner for the City of Madison, Wisconsin; LEONARD HOWELL, as City Manager of the City of Madison, Wisconsin, and THE COMMON COUNCIL OF THE CITY OF MADISON, WISCONSIN, Defendants.

Before Hon. Alvin C. Reis, Judge.

DECISION

Plaintiff seeks a declaratory judgment as to the constitutionality of Madison's milk ordinances which provide: (1) No milk shall be sold as pasteurized milk in the city of Madison unless it has been pasteurized and bottled within a radius of five miles from the Capitol Square. (2) The Health Department shall not be "obligated" to inspect and issue permits to farms located more than twenty-five miles from the Capitol Square, as to raw milk to be delivered to pasteurization plants for sale in Madison.

The Madison ordinance, as adopted August 27, 1949, contains the five-mile and twenty-five mile provisions in sections 7.21 and 7.11, respectively, as follows:

> "7.21. Pasteurization Plants to be Within Five Mile Radius. It shall be unlawful for any person, association or corporation to sell, offer for sale or have in his or its possession with intent to sell or deliver in the City of Madison, any milk, cream, or milk products as pasteurized unless the same shall have been pasteurized and bottled in the manner herein provided within a radius of five miles from the central portion of the City of Madison otherwise known as the Capital Square, at a plant housing the machinery, equipment and facili-

ties, all of which shall have been approved by the Department of Public Health".

"7.11. Permits. . . . On the filing of an application for a permit with the Health Commissioner he shall cause the source of supply named therein to be inspected and shall cause all other necessary inspections and investigations to be made. The Health Department shall not be obligated to inspect and issue permits to farms located beyond twenty-five (25) miles from the central portion of the City of Madison, otherwise known as the Capital Square."

The Madison milk situation is summarized in the City's brief (p. 3) as follows:

"Madison is in the center of Dane County which produced in 1948 over 600,000,000 pounds of milk. This is more than ten times the milk used in the City. Large quantities of milk are shipped to the Chicago market and large quantities are made into cheese, butter, evaporated milk, etc. The area within a radius of 25 miles from the Capital Square in the City of Madison includes practically all of Dane County and portions of adjoining counties. At present Madison's pasteurized milk is furnished entirely from farms located within about 18 miles of the Capital Square.

"There are several distributors of milk in Madison, all of whose plants are located within 5 miles of the Capital Square: (1) The University of Wisconsin has its own plants for pasteurizing and supplying milk to University Halls and commons; (2) Rennebohm Farm supplies only the various Rennebohm Drug Stores and does not supply all of the stores' needs. There are three retail and wholesale dealers, the Borden Company, Bancroft Dairy and Bowman Farm Dairy supplying the city.

"Many of the producers are represented by a cooperative association which bargains for the producer with the dealers on the price of milk, checks weights and tests, inspects milk and assists in milk quality control.

The cooperative also owns and operates a surplus plant through which it markets milk of Madison licensed producers which may from time to time be in excess of the milk required for consumption in Madison.

"All producers delivering on the Madison market are licensed by the City Health Department and are inspected by representatives of the Health Department as well as by representatives of the dealers and of the Cooperative Association."

Plaintiff is an Illinois corporation, with its principal place of business in Chicago. It has pasteurization plants at Chemung and Huntley, Illinois. Its milk is supplied by about 950 farms located chiefly in Illinois. These farms are licensed by the Chicago Board of Health and are inspected by that department. The plaintiff company also inspects the producers' farms and makes tests of milk purchased.

Plaintiff applied to the Madison Board of Health in March, 1948, for a license to sell milk in Madison. This was refused. On October 1, 1949, plaintiff applied to the Madison Board of Health for 950 farm permit application blanks. These were not furnished. Dr. Kincaid—the City Health Commissioner—explained that there was no point in having Dean's Illinois producers apply for permits until it was determined whether the five-mile limit on pasteurization plants was legal—since admittedly Dean has no intention of pasteurizing within five miles of Madison but desires to sell milk in Madison which has been pasteurized in Illinois plants.

The above reflects with reasonable adequateness the background of the instant case.

We are constrained to remark that a record has been built up in the present law suit upon miscellaneous matters not decisive of the case, in our judgment, such as the relative merits of the United States Public Health Service "model" milk ordinance and the Chicago milk ordinance as compared with the Madison general milk requirements' ordinance; also the relative goodness and purity of plain-

tiff Dean's milk compared with Bowman's, Borden's and Bancroft's, *et al.*, now consumed in Madison; further, the relative efficiency of inspection as between the Chicago Health Department and the Madison Health Department. Counsel even argue the issue whether the "methylene blue" or the "plate count" is the preferable test to determine if the number of bacteria in milk exceeds 200,000 per cubic centimeter!

We shall not exhaust brain tissue on such wanderings.

This Court's duty is to decide upon constitutionality, which decision, if it is good law, is good under the Federal Constitution anywhere in the United States and that decision cannot be swayed by a consideration of whether Madison's general milk requirements' ordinance is better or worse than some other ordinance in its provisions that water must be from state well-code wells, and milk must be cooled to 50°, while Chicago says 60°; and manure shall be pitched fifty feet from the barn door, whereas Chicago permits the pitch to be but thirty; the Madison ordinance requiring plant inspection every thirty days but Chicago, six months; and the provision as "the trap in the drain from the milk house", the "breezeway between the milk-house and the barn"; etc., etc.

How would the constitutional question in California be changed, even if Hollywood had a better or worse trap in the drain or breeze-way provision than Madison or Chicago? How would it be changed in New York if Schenectady called for 48° cooling or issues a mandate to scurry out the manure at least 70 feet?

The constitutional question still is: Can Madison or Chicago or Hollywood or Schenectady provide that milk sold in its city must have been pasteurized within five miles of the center of the city and that farms more than twenty-five miles from the city need not be inspected (in effect, may not be eligible for a "permit" to sell raw milk to pasteurization plants serving the city)?

True it may be, as counsel for the City points out (brief, p. 17), that the *basic* local situation as to whether a city has ten times as much milk produced in its immediate environs as it needs—which is Madison's situation—or whether it is

compelled to "range far afield" for milk (*Ibid*)—which may be the fact in large metropolitan areas—this or some similar underlying and fundamental economic condition may affect the reasonableness, and hence the validity, of an ordinance:

But blue test or plate count—a pitch of fifty or thirty feet from the barn—50° or 60° cooling—and such minutiae *ad infinitum*—go only to the question of whether Madison or Chicago has the better kind of milk regulations as to health and sanitary requirements. These details as to how to produce and care for milk do not hit the constitutional issue of the five-mile limit at all, as we view it.

Is Madison's five-mile pasteurization ordinance constitutional?. It is.

Madison's five-mile pasteurization ordinance is a valid regulation under the "police power" to protect the public health and welfare. It simplifies inspection of plants by requiring them to be near at hand, thus permitting more intense and constant inspecting than if such establishments were located anywhere in the United States.

A city like Madison, in the interests of public health, is entitled to set up its own system of milk inspection, if it be a reasonable one. The City is not forced to rely upon inspection by some other governmental unit nor to submit to "reciprocal inspection" unless some higher authority properly decrees it.

One municipality does not have to sacrifice its standards to those of another community which may be lower nor is one governmental unit necessarily compelled to yield its independence to another, even though the latter's gauges of inspection purport to be equal or slightly higher.

The City of Madison—in the public concern over health—has an autonomy, a measure of local self-government, which, if exercised reasonably, need give way only to a constitutional enactment by the legislature of Wisconsin or the Congress of the United States, if such exists. None such does exist as yet.

Is this five mile limit valid? The all-sufficient answer is that our Supreme Court of Wisconsin has held it valid, i.e., has held that an ordinance imposing a *six* mile limit on pasteurization plants is valid; and probably no one

would seek to split the hair on principle between five and six. The six mile ordinance was the Beloit enactment —which our Supreme Court upheld against all constitutional objection.—*Dyer* v. *City Council of Beloit*, 250 Wis. 613—*The high court's decision was on June 10, 1947.*

The Supreme Court of Wisconsin as a Court must overrule its decision of two years ago or else Madison's five mile pasteurization ordinance stands.

Petitioner in the *Beloit* case was one Dyer, a distributor for the same Dean Milk Company which is plaintiff in the case at bar. The City denied him a license to sell milk in Beloit because of its ordinance which provided (as quoted in the Supreme Court opinion, p. 615):

> "No pasteurized milk shall be sold in the city of Beloit which shall not have been pasteurized in approved plants within six miles from the intersection of State street and East Grand avenue in the city of Beloit."

The Supreme Court in the *Beloit* case (p. 615) states Dyer's (Dean's) position which is exactly Dean's position today:

> "It is claimed this is a trade barrier, violates the right of contract guaranteed under the Fourteenth amendment of the constitution of the United States, and is in conflict with the interstate-commerce clause of the United States constitution, sec. 8, art. I."

The Supreme Court so thoroughly disposed of Dyer's (Dean's) contentions—which are the same contentions of Dean today—and that Court so precisely stated the factual picture at Beloit which is quite parallel with the one at Madison—that we quote at length from the Court's 1947 opinion (pp. 616-618):

> "That cities have a right to pass a milk ordinance for the welfare and health of their citizens is not disputed, and milk ordinances are general in the state of Wisconsin and elsewhere in the nation. Such an ordinance must be reasonable and not arbitrary, must not go

beyond the reasonable demands of the occasion, and must tend to accomplish the purpose of its adoption. Courts will not interfere with the exercise of police power by a municipal corporation in the absence of a clear abuse of discretion and unless it is manifestly unreasonable and oppressive, for it is not within the province of the courts, except in clear cases, to interfere with the exercise of this power reposed by law in municipal corporations. 11 Am. Jur., Constitutional Law, p. 1092, sec. 307. Municipal corporations are *prima facie* the sole judges respecting the necessity and reasonableness of ordinances under their police power, and every intendment is to be made in favor of the lawfulness and reasonableness of such ordinance. The city is presumed to have full knowledge of local conditions, and its adoption of an ordinance in the light of this knowledge creates a *prima facie* presumption that it is reasonable. 3 McQuillin, Mun. Corp. (2d ed.) p. 110, sec. 951. The reasonableness of an ordinance depends upon the purpose sought to be accomplished and the effect upon all who must comply with it.

"The city of Beloit is in the center of an area producing great quantities of milk, containing a large number of pasteurization plants, condenseries, and creameries. The area described in the ordinance includes pasteurization plants both in Wisconsin and in Illinois. Over four hundred farms are included in the area and slightly over one hundred farms produce sufficient milk to supply the demand of the city of Beloit. Thus three fourths of the milk produced in the area is not required to supply the city of Beloit and is shipped elsewhere for such purposes as it may properly be used. The supply of milk in the area is ample for a large number of additional milk plants of any type that may desire to engage in the business. The ordinance clearly was not passed for the purpose of limiting the business to the plants then in operation. Milk is usually delivered to near-by plants as a matter of economy and convenience, which answers the contention that the location of the farms producing the

milk is not limited by the ordinance but the location of the pasteurization plant is. The ordinance in question not only provides for the inspection of the pasteurization plants, but requires the inspection of the farms producing the milk.

"It is claimed by appellant, and admitted by the city sanitarian from a few examinations made by him, that the milk produced by the Dean Milk Company complied with the sediment tests, blue tests, other tests, and content requirements of the ordinance of the city of Beloit. This could well be true of milk purchased from a pasteurization plant a much greater distance from the city of Beloit. Convenience, efficiency, and cost of inspection enter into a determination of the question of the reasonableness of an ordinance. It is said in *State ex rel. Larson* v. *Minneapolis* (1933), 190 Minn. 138, 142, 251 N. W. 121, with reference to the constitutionality of a milk ordinance, quoting with approval from the trial court:

"'It is obvious that the adequate inspection is a reasonable precaution. It is obvious that consideration of convenience, efficiency and cost of inspection are proper to be taken into account in determining the question of reasonableness. It is also obvious that there is somewhere a limit of distance beyond which inspection by the city's agents would be too inconvenient, too costly, and too likely to be ineffective to be practicable. It seems to me there can be no doubt of the right of the city council to fix a reasonable limit beyond which it will not provide for inspection, and beyond which, for that reason, pasteurization plants will not be licensed.'

"The city of Beloit has two employees in this department, the city sanitarian and an assistant, and proof was offered that to assume the inspection of the additional plant and farms it would require the employment of another employee at a cost of $2,400 per year, and if other likewise distant plants were included it would cost much more. Convenience and efficiency are self-evident.

> "It cannot be said that the city, in adopting the section in dispute, arbitrarily acted on the question of convenience, efficiency, and cost of inspection, unless we adopt the rule in the case of *Meridian, Ltd.*, v. *Sippy*, 54 Cal. App. (2d) 214, 128 Pac. (2d) 884, where the court said that milk production is a legitimate business and so long as persons engaged in the business put out a clean, pure and wholesome product it should be permitted to flow freely on the markets, unburdened by duplication of inspection and prohibitive trade barriers, *which rule we do not adopt.*" (Our italics.)

It should be noted that the Supreme Court of Wisconsin, in the foregoing, REFUSES to adopt the rule laid down by some court or courts, namely, that if the milk is "a clean, pure and wholesome product", therefore "it should be permitted to flow freely on the markets, unburdened by duplication of inspection and prohibitive trade barriers" —which is Dean's argument in almost its exact words, *infra*.

Our Court then continued and declared the law in a nutshell (pp. 618-619):

> "Every ordinance must stand or fall upon its own merits. It is either reasonable or arbitrary in accordance with the facts and purposes it is intended to serve, if within the police powers of the municipality adopting it. The area necessary to be included in the ordinance could well depend upon the population to be served, the amount of milk produced, and the location of the pasteurization plants with reference to the population to be served. A reasonable exercise of police power is not a trade barrier, and contract rights guaranteed under the Fourteenth amendment of the federal constitution do not have a superior right to the right of a municipality to reasonably protect the health of its citizens."

Thus our Supreme Court dealt with Dean's argument that due process was denied it, under the Fourteenth Amendment of the Federal Constitution.

Dean in the case now before us, as well as in the *Beloit* case, advanced also the argument that the local ordinance interfered with interstate commerce and hence impinged upon the Federal Constitution.

Dean's position on interstate commerce is set forth concisely in its reply brief (p. 6) in the present case: "The test is, is the food or milk which the plaintiff proposes to sell a pure, wholesome product? If it is, it cannot be barred from interstate commerce."

But the Supreme Court did not agree with this argument in the *Beloit* case, for with equal conciseness the Court stated (p. 619):

> "This ordinance does not violate the interstate-commerce clause of the United States constitution. Milk may be furnished from farms and pasteurization plants in the state of Illinois as well as in the state of Wisconsin, and in fact milk is so furnished. The production and delivery of milk are essentially local problems with which congress has not sought to deal, leaving the city of Beloit free to act in the exercise of its police powers."

To be sure, the Court indicated that milk was being furnished to Beloit from both Illinois and Wisconsin; and it concluded that interstate commerce was not impaired. That consideration in the *Madison* case would go only to the twenty-five mile limit on inspection and permits to farms—the *second* ordinance herein attacked which we will discuss, *infra*.

There certainly can be no interference with interstate commerce by an ordinance reciting that milk must be *pasteurized* within five miles of Madison. That requirement seizes upon the product after it has come to rest in the state. That is not a prohibition of interstate commerce. It is a purely local regulation.

We unquestionably could render a declaratory judgment today upholding constitutionality of the five mile pasteurization ordinance in a one sentence opinion citing *Dean* v. *Beloit* decided 1947—except for the strange aftermath to the Supreme Court's opinion in that case.

After the Court's decision in their favor, the Beloit authorities changed their mind, amended their ordinance, and granted Dyer (Dean) a license. Dyer had, in the meantime, appealed from our Supreme Court's decision to the Supreme Court of the United States and there the Beloit authorities adopted the twist of moving to dismiss Dyer's appeal upon the ground that their change of heart by granting Dyer (Dean) a license had made the case moot. Thereupon, Dean objected to dismissing the appeal for the purported reason that this would leave the Wisconsin Supreme Court's decision in effect, upholding the ordinance.

So, the Supreme Court of the United States *vacates* the Wisconsin Supreme Court's decision and remands the case to the Wisconsin high court "for such further proceedings as by that court may be deemed appropriate." Whereupon the Wisconsin Supreme Court REVERSES the Circuit Court for Rock County which originally it had affirmed in holding the ordinance valid!—*Dyer* v. *City Council of Beloit*, 252 Wis. 249 (March 29, 1948).

We quote in its entirety the text of the denominated reversal, all of which is printed in the type of a head-note (252 Wis. at 250):

> "In this case, the court on June 10, 1947, affirmed a judgment of the circuit court dismissing the appellant's petition for a writ of *mandamus* to compel the city of Beloit to issue to the appellant a license as a milk distributor, and held a certain milk ordinance of the city constitutional. The case is originally reported in 250 Wis. 613, 27 N. W. (2d) 733. In proceedings on appeal to the United States Supreme Court, the respondents moved to dismiss the appeal on the ground that the case was moot, the respondents confessing error and setting forth that the city had amended the ordinance and issued a milk license to the appellant pursuant to the amended ordinance. The appellant opposed a dismissal of the appeal on the ground, among others, that a dismissal would result in permitting the judgment and decision of this court to stand as a valid judgment and decision holding the original ordinance constitutional and giving the city

the right to re-enact the original ordinance. The United States Supreme Court on February 2, 1948, entered a mandate providing in part: 'On consideration of the motion of the appellees to dismiss, it appearing that the cause has become moot, the judgment of the supreme court of Wisconsin is vacated and the cause is remanded for such further progeedings as by that court may be deemed appropriate.' 333 U. S. 825, 68 Sup. Ct. 450, 92 L. Ed. 0000. [Reporter.]

"After the filing of the mandate of the United States Supreme Court in this court, the appellant on March 29, 1948, moved that the judgment of the circuit court be reversed and for other relief. After hearing counsel for the respondents as well as for the appellant, this court on March 29, 1948, entered the following mandate:

"*By the Court.*—'Judgment appealed from is reversed and cause remanded with directions to dismiss the complaint.'"

This *pro forma* action, the Supreme Court at Washington by vacating and the Wisconsin Supreme Court by so-called reversing, under the circumstances, surely has not erased and annihilated our Supreme Court's decision in the Beloit case *on the merits*.

Said the Supreme Court of the United States in *Berry v. Davis*, 242 U. S. 468, 470; 61 L. ed. 441, 442:

> "An appeal was taken to this court in 1914. In 1915 the Act of 1913 was repealed, and the substituted act does not apply to the plaintiff. . . . Therefore, upon the precedents we are not called upon to consider the propriety of the action of the district court, but the proper course is to reverse the decree and remand the cause, with directions that the bill be dismissed without costs to either party."

Plaintiff Dean cites us to a very late case—September 22, 1949—wherein the Supreme Court of Illinois decides in Dean's favor and holds invalid a Waukegan ordinance forbidding sale of milk in that city, unless the milk was

produced and pasteurized in Lake County (wherein Waukegan is located).—*Dean Milk Co.* v. *City of Waukegan* — Ill. —, 87 N. E. (2d) 751.

It is to be observed, of course, that the Waukegan ordinance demanded that *both* production and pasteurization of milk must be within Lake County, whereas Madison's five mile ordinance on pasteurization—in and of itself—contains no mileage limit on production. The Wisconsin Supreme Court's decision in the Beloit case and the Illinois Supreme Court's decision in the Waukegan case, therefore, may be distinguishable.

Let us suppose, however, that the decisions of the highest courts of Illinois and Wisconsin are in conflict. What of it? We have never appreciated the idea of trying to reconcile the decisions of all courts everywhere, which apparently is the strain of most attorneys' briefs and of many judicial opinions.

Why compare incomparables? Men's minds and ideals and backgrounds differ, particularly in that shadowy domain of what is in the best interest of public health and the "general welfare."

Judges are lawyers. Lawyers differ in their opinions. Judges do not cease to be lawyers simply because they don black robes. Why should they not continue to have divergent opinions?

Philosophizing aside—Illinois and Wisconsin high courts are opposed, we assume, on a certain issue of constitutional law. Shall we follow the Supreme Court of Illinois or the Supreme Court of Wisconsin? *Which do we have to follow?* Perforce it is the Wisconsin Supreme Court, even though we disagreed with it—*which we do NOT* in this case.

Accordingly, our conclusion is that the die has been cast—so far as Madison's five mile pasteurization ordinance is concerned—by the Supreme Court's sustaining of Beloit's six mile pasteurization ordinance, *supra*.

We come now to the 25 mile provision on inspection of milk farms and the consequence implicit in the ordinance, that is, that the Health Department need not inspect farms beyond 25 miles from Madison and hence these farmers—950 of them in Dean's territory in Illinois—may be in-

eligible for permits to produce milk for the Madison market.

We agree with the City Attorney (brief pp. 2, 22) that the Court need not pass upon this 25 mile ordinance provision as to farmers, in the present litigation. Dean Milk Company is not a farmer—owns no farms. The 950 farmers are not parties in this action nor is a single Illinois farmer such a party. The party plaintiff milk distributing corporation is not privileged to champion the rights of others and force an adjudication as to them.

Moreover, there is no "justiciable controversy"—to use an erudite term—between Dean and Madison as to the 25 mile limit—and justiciable controversy is of the essence in an application for a declaratory judgment.

Dean Milk Company need not be concerned by where its farmer patrons live, so long as Dean is not pasteurizing, and has expressed no intent to pasteurize, within five miles of Madison. The question is completely academic and moot as to where Dean's milk comes from, if Dean is not going to sell in Madison—and Dean cannot sell in Madison without pasteurizing inside the five mile limit, if Madison's five mile pasteurization ordinance is valid—and we hereby hold it to be valid.

So our decision is confined to upholding the constitutionality of the five mile pasteurization ordinance and we do not penetrate the inquiry as to whether restricting milk production, in substance, to a 25 mile zone, is a violation of anyone's constitutional rights. We shall cross that bridge when we get to it in a proper case, if ever we do.

The City Attorney may prepare and submit to opposing counsel a declaratory judgment, adjudging sec. 7.21 of the city ordinance of Madison to be valid in its enactment as follows:

> "7.21. Pasteurization Plants to be Within Five Mile Radius. It shall be unlawful for any person, association or corporation to sell, offer for sale or have in his or its possession with intent to sell or deliver in the City of Madison, any milk, cream, or milk products as pasteurized unless the same shall have been pasteurized and bottled in the manner herein provided within a radius of five miles from the central portion of the

City of Madison otherwise known as the Capital Square, at a plant housing the machinery, equipment and facilities, all of which shall have been approved by the Department of Public Health."

Dated, December 13, 1949.

APPENDIX "B"

IN SUPREME COURT OF THE STATE OF WISCONSIN

AUGUST TERM, 1949

No. 216

DEAN MILK CO., a Corporation, Appellant,

v.

CITY OF MADISON, WISCONSIN, a Municipal Corporation, et al., Respondents.

Appeal from a judgment of the Circuit Court for Dane County: ALVIN C. REIS, Circuit Judge. *Affirmed.*

This is an action by the Dean Milk Company, an Illinois corporation, against the city of Madison, Dr. C. K. Kincaid, its Health Commissioner, Leonard Howell, its city manager, and its common council, for a declaratory judgment as to the constitutionality of two sections of the milk ordinance of said city providing substantially as follows: (1) No milk shall be sold as pasteurized milk in the city of Madison unless it has been pasteurized and bottled within a radius of five miles from the capitol square; and (2) the Health Department shall not be obligated to inspect and issue permits to farms supplying raw milk for sale in said city if said farms are located beyond twenty-five miles from the capitol square. Judgment was entered December 30, 1949, declaring: (1) That the five-mile limitation is constitutional, and (2) that in this action no justiciable controversy existed as to the twenty-five mile limitation and plaintiff's com-

plaint was dismissed so far as it involved that question. Plaintiff appealed from the judgment.

Plaintiff is engaged in distributing Grade A pasteurized milk and other milk products in Chicago and other communities in Illinois and southern Wisconsin, including some within Dane county. It purchases and gathers milk from approximately nine hundred fifty farms located in northern Illinois and southern Wisconsin. None of these farms is within twenty-five miles of Madison. It pasteurizes and bottles the milk so gathered in plants at Chemung and Huntley, Illinois. The exact distance from these plants to Madison does not appear in the record, but they are located beyond the southern boundary of the state of Wisconsin which is approximately fifty miles from Madison.

On March 8, 1948, the plaintiff applied to the city of Madison for a license to sell its Grade A pasteurized milk and other milk products within the city. On March 12, 1948, its application for such license was denied. On November 20, 1948, plaintiff commenced this action for declaratory relief. While this suit was pending, and on August 27, 1949, the city of Madison adopted a new ordinance retaining the five-mile limitation and inserting the twenty-five mile limitation, which up to that time had not been a part of its milk ordinance. On October 1, 1949, plaintiff applied to the Madison Board of Health for nine hundred fifty farm application blanks. They were not forwarded. Plaintiff then filed an amended complaint attacking both the five-mile and twenty-five mile limitations. The defendants secured an order to show cause why all reference to the twenty-five mile limitation should not be stricken from the plaintiff's amended complaint. The trial court denied this order to show cause but ordered plaintiff to file a second amended complaint separating the two causes of action. Thereafter the plaintiff filed its second amended complaint.

The testimony of plaintiff's witnesses showed in detail the means used by the plaintiff to inspect the farms from which it purchased raw milk and the inspection and care taken in each step after the milk was gathered from the farm until bottled and delivered to dealers for sale. Plaintiff also

introduced testimony as to the inspection made by the inspectors of the Chicago Health Department and of spot checks by inspectors for the United States Public Health Service.

The defendants, by their witnesses, showed that Madison is the center of Dane county which in 1948 produced six hundred million pounds of milk, more than ten times the amount consumed in the city. They also showed in detail how the city inspected the farms producing milk for consumption within the city and the plants in which it is pasteurized and bottled. Both sides showed the tests made in their laboratories as to raw milk from the farms and also of the products after pasteurization.

BROADFOOT, J.:

The testimony introduced proves conclusively that milk is a very perishable product, and that it is subject to contamination by odors, by foreign substances, and by bacteria. In order to be sure of healthful milk of high quality it is necessary to have rigid and frequent inspection of the farms producing raw milk for human consumption. It is necessary to inspect the ventilation, lighting and cleanliness of the barns in which the cows are sheltered, the drainage and water supply, the milking equipment, the cooling and storage equipment, and the health of the cattle and of the persons taking care of the milk, as well as the pasteurization plants.

The plaintiff contends that its inspection, with that of the Chicago Board of Health and spot checks by the United States Public Health Service, result in a product that is clean, pure and wholesome, and that it should be permitted to flow freely to market unburdened by duplication of inspection and that the restrictions in the Madison milk ordinance are prohibitive trade barriers and therefore unconstitutional under the Fourteenth Amendment and the Interstate Commerce Clause of the United States constitution. The courts of some states have so held. This court has held otherwise in *Dyer* v. *City Council of Beloit*, 250 Wis. 613, 27, N. W. (2d) 733, in which

it held valid an ordinance of the city of Beloit which contained the following provision:

"No pasteurized milk shall be sold in the city of Beloit which shall not have been pasteurized in approved plants within six miles from the intersection of State street and East Grand avenue in the city of Beloit."

In that case the court said, p. 616:

"That cities have a right to pass a milk ordinance for the welfare and health of their citizens is not disputed, and milk ordinances are general in the state of Wisconsin and elsewhere in the nation. Such an ordinance must be reasonable and not arbitrary, must not go beyond the reasonable demands of the occasion, and must tend to accomplish the purpose of its adoption. Courts will not interfere with the exercise of police power by a municipal corporation in the absence of a clear abuse of discretion and unless it is manifestly unreasonable and oppressive, for it is not within the province of the courts, except in clear cases, to interfere with the exercise of this power reposed by law in municipal corporations. 11 Am. Jur., Constitutional Law, p. 1092, sec. 307. Municipal corporations are *prima facie* the sole judges respecting the necessity and reasonableness of ordinances under their police power, and every intendment is to be made in favor of the lawfulness and reasonableness of such ordinance. The city is presumed to have full knowledge of local conditions, and its adoption of an ordinance in the light of this knowledge creates a *prima facie* presumption that it is reasonable. 3 McQuillin, Mun. Corp. (2d ed.) p. 110, sec. 951. The reasonableness of an ordinance depends upon the purposes sought to be accomplished and the effect upon all who must comply with it."

The present status of the decision in the *Dyer Case* is in dispute. The plaintiff in that case appealed to the United States Supreme Court and while the appeal was pending the city of Beloit amended its ordinance and granted Dyer a license. A motion was then made on behalf of the Beloit authorities to dismiss Dyer's appeal upon the ground that

the case had become moot. Plaintiff Dyer objected to dismissing the appeal but the United States Supreme Court on February 2, 1948, entered a mandate providing in part:

"On consideration of the motion of the appellees to dismiss, it appearing that the cause has become moot, the judgment of the supreme court of Wisconsin is vacated and the cause is remanded for such further proceedings as by that court may be deemed appropriate." 333 U. S. 825.

Thereafter this court (252 Wis. 249, 250, 32 N. W. (2d) 333) after reviewing the action of the United States Supreme Court and quoting the above portion of its mandate entered the following mandate:

"By the Court.—Judgment appealed from is reversed and cause remanded with directions to dismiss the complaint."

The plaintiff contends that this eliminated the decision in the *Dyer Case*. The trial court answered this argument as follows:

"This *pro forma* action, the Supreme Court at Washington by vacating and the Wisconsin Supreme Court by so-called reversing, under the circumstances, surely has not erased and annihilated our supreme court's decision in the *Beloit* case *on the merits*.

"Said the Supreme Court of the United States in *Berry* v. *Davis*, 242 U. S. 468, 470; 61 L. Ed. 441, 442:

"'An appeal was taken to this court in 1914. In 1915 the Act of 1913 was repealed, and the substituted act does not apply to the plaintiff. * * * Therefore, upon the precedents we are not called upon to consider the propriety of the action of the district court, but the proper course is to reverse the decree and remand the cause, with directions that the bill be dismissed without costs to either party.'"

Whatever the effect of the mandate of this court in the *Dyer Case* after the record was remanded by the

United States Supreme Court, the reasoning and logic of that decision still stand.

In addition to what was said by this court in the *Dyer Case*, once the plaintiff has recognized the necessity of rigid standards for the production, processing and marketing of milk for human consumption and the necessity of frequent and rigid inspection to see that these standards are maintained, then it follows, as stated in the *Dyer Case* (p. 617), "Convenience, efficiency, and cost of inspection enter into a determination of the question of the reasonableness of an ordinance." Dr. Kincaid, the health commissioner of the city of Madison, testified that if plaintiff's milk was to be sold in Madison it would require the hiring of additional inspectors to inspect the farms from which the milk is gathered and the plants in which it is pasteurized and bottled. Thus convenience and efficiency would be lessened and costs would be increased. Plaintiff contends that it would be unnecessary to hire additional inspectors, and that Dr. Kincaid as health commissioner could satisfy himself as to the quality of plaintiff's product by relying upon the inspections already made of the farms and plants in Illinois. The trial court made this answer to that contention:

"A city like Madison, in the interests of public health, is entitled to set up its own system of milk inspection, if it be a reasonable one. The city is not forced to rely upon inspection by some other governmental unit nor to submit to 'reciprocal inspection' unless some higher authority properly decrees it.

"One municipality does not have to sacrifice its standards to those of another community which may be lower nor is one governmental unit necessarily compelled to yield its independence to another, even though the latter's gauges of inspection purport to be equal or slightly higher.

"The city of Madison—in the public concern over health—has an autonomy, a measure of local self-government, which, if exercised reasonably, need give way only to a constitutional enactment by the legislature of Wisconsin or the Congress of the United States, if such exists. None such does exist as yet."

We agree with the trial court. The five-mile limitation as to pasteurization plants is reasonable as applied to this plaintiff. It has no pasteurization plant within any reasonable distance of Madison. This provision of the ordinance was not adopted to exclude plaintiff, nor does it discriminate against it.

As to plaintiff's contention that the twenty-five mile limitation is likewise unconstitutional, we affirm the trial court in holding that there is no justiciable controversy between the parties on that question. Dean Milk Company is not a farmer and, so far as the record shows, owns no farm. No farmer producing milk is a party to this action, and plaintiff is not entitled to ask for a judgment declaring the rights of persons who are not parties to the action.

By the Court.—Judgment affirmed.

APPENDIX "C"

Wisconsin Voluntary Grade A Fluid Milk Plan Offers New Service To Out-of-State Markets

Wisconsin is the nation's Number 1 milk producing state. For many years we have produced daily about 6 quarts of milk per capita as compared with an average of about one quart per capita for the nation.

With this huge production of milk it is natural that the greater part must be marketed outside of the state—as fluid milk and cream or as manufactured dairy products. Many metropolitan markets depend upon Wisconsin as their source of fluid whole milk to meet the daily needs of their people. In 1948, as an example, we produced approximately 15,000,000,000 pounds of milk. Of this production, 2,395,000,000 pounds, or 16 per cent, was marketed outside of the state as fluid milk and cream.

Now, for the first time, Wisconsin is making available a service which will provide inspection and continuous supervision for areas producing milk for the fluid markets in other states.

The people of other states and in the cities outside of Wisconsin seek a supply of high quality fluid milk in our state. They should not be expected or required to maintain their own inspection services in Wisconsin. Such states and cities, naturally, are vitally interested in quality. They want a milk supply that is pure and wholesome and which has been produced and processed under the highest quality standards from the standpoint of human health. This is a just demand, and Wisconsin is in complete accord with such safeguards for the protection of public health.

General Order No. 125 provides the machinery which will make it possible for our dairy plants to supply the demands of these out-of-state markets and give the people of those areas the public health safeguards to which they are entitled. High sanitary standards are set up, coupled with a close, continuous state inspection service by the Wisconsin State Department of Agriculture. This inspection will be supplemented by U. S. Public Health Service inspections to insure consumers throughout the United States that when they buy Wisconsin Grade A milk they are getting milk which meets every human health and sanitation requirement.

The service provided by this order is primarily a service to milk consumers in the metropolitan centers throughout the United States. Service to Wisconsin producers and processors is secondary.

The standards promulgated in the order have been modeled after the USPHS recommended ordinance and milk code, and its provisions are substantially the equivalent of this code.

General Order 125 was prepared jointly by the Wisconsin State Department of Agriculture and the State Board of Health. The order has also been approved by the State Board of Health.

During its preparation the Department of Agriculture has enjoyed the counsel and assistance of an Advisory Committee consisting of men whose names are recognized throughout the nation as leaders in this field. Their counsel has been of great value in drafting standards which will meet the demands of fluid milk markets throughout

the nation. Members of this committee will continue to work with the Department of Agriculture in the operation of the program.

The plan calls for constant inspection and supervision of producing farms, plants, equipment and transportation facilities by competent milk sanitarians employed by the Wisconsin Department of Agriculture. The State Board of Health will serve as the survey and certification agency and all ratings will be periodically spot-checked before publication by the Region V Office of the U. S. Public Health Service. In addition, the State Board of Health will serve in an advisory capacity to the program and will share in the responsibility for training of the milk sanitarians, plant managers and fieldmen.

MILTON H. BUTTON, *Director,*
State Department of Agriculture.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950.

No. 258

DEAN MILK COMPANY, a corporation,
Appellant,

vs.

CITY OF MADISON, WISCONSIN, a Municipal Corporation, DR. C. K. KINCAID, as Health Commissioner for the City of Madison, Wisconsin, LEONARD HOWELL, as City Manager of the City of Madison, Wisconsin, and THE COMMON COUNCIL OF THE CITY OF MADISON, WISCONSIN,
Appellees.

Appeal from the Supreme Court of the State of Wisconsin.

REPLY TO APPELLEES' STATEMENT IN OPPOSITION TO JURISDICTION.

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INDEX.

PAGE

I.

The fact that Dean Milk Company sells its milk through distributors does not deprive it of its Constitutional rights 1

II.

The decision of the Wisconsin Supreme Court appealed from is contrary to the decisions from other states 4

Table of Cases.

Dean Milk Company v. City of Madison, 43 N.W. 2d 480 at 482 4

Savage v. Jones, 225 Wis. 501, 32 S. Ct. 715 2

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Appellees.

Appeal from the Supreme Court of the State of Wisconsin.

REPLY TO APPELLEES' STATEMENT IN OPPOSITION TO JURISDICTION.

May It Please the Court:

I.

The Fact that Dean Milk Company Sells Its Milk Through Distributors Does Not Deprive It of Its Constitutional Rights.

On page eight of appellees' statement in opposition to appellant's statement of jurisdiction and motion to dismiss or affirm is contained the following statement:

"The Dean Milk Company does not transport milk to or sell milk in the City of Madison or Dane County, nor does it propose to. It sells bottled, pasteurized milk to Robert Alder at Chamung, Illinois. Robert Alder transports the milk in his own refrigerated truck and sells it to stores in Wisconsin, including various communities in Dane County (R. p. 103)."

This same contention was made, and rejected by this Court in the case of *Savage* v. *Jones*, 225 U. S. 501, 32 Sup. Ct. 715, at page 720, where it is stated:

"It is said that the complainant is not entitled to invoke the constitutional protection, in that he fails to show injury. * * * The argument rests upon the averment in the bill that his sales were made at Minneapolis, the goods 'to be delivered free on board of cars' at that point, 'and delivered to purchasers and consumers within the state of Indiana in the original unbroken packages, freight being paid thereon by the consumers and purchasers.' In answer, it must again be said that 'commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business.' * * * It clearly appears from the bill that the complainant was engaged in dealing with purchasers in another state. His product manufactured in Minnesota was, in pursuance of his contracts of sale, to be delivered to carriers for transportation to the purchasers in Indiana. This was interstate commerce, in the freedom of which from any unconstitutional burden the complainant had a direct interest. The protection accorded to this commerce by the Federal Constitution extended to the sale by the receiver of the goods in the original packages. * * * An attack upon this right of the importing purchasers to sell in the original packages bought from the complainant not only would be to their prejudice, but inevitably would inflict injury upon the complainant by reducing his interstate sales.

—a result to be avoided only through his compliance with the act by filing the statement and affixing to his goods the labels it required. According to the bill, the state chemist had threatened the complainant that, in default of such compliance, he would cause the arrest and prosecution of every person dealing in the article within the state, and had distributed broadcast throughout the state warning circulars. If the statute of Indiana, as applied to sales by importing purchasers in the original packages, constitutes an unwarrantable interference with interstate commerce in the complainant's product, he had standing to complain, and was entitled to relief against enforcement by the defendant of the illegal demands."

No contention was made in either the trial court or the Supreme Court of the State of Wisconsin that the method by which the Dean Milk Company distributed and sold its milk deprived it of the constitutional guarantees.

The record at 103-104 shows that the milk proposed to be sold in Madison is delivered in the original packages as it leaves the Dean plant at Chemung, Illinois. It was the Dean Milk Company that applied for a license to sell its milk and milk products in the City of Madison, Wisconsin, and it was denied a license on the ground that its milk was not pasteurized within five miles, as provided by Sec. 7.21 of the Madison Ordinance, and that its milk was not produced on farms located within twenty-five miles, as provided by Sec. 7.11 of the Madison Ordinance.

We contend that the method by which the Dean Milk Company sells its milk is immaterial. We contend that the Dean Milk Company has a constitutional right to sell its milk in Madison, Wisconsin, and it makes no difference whether it sells its milk directly or through distributors. The above case from this Court supports our contention.

II.

The Decision of the Wisconsin Supreme Court Appealed From Is Contrary to the Decisions from Other Courts.

Beginning on page sixteen of appellees' typewritten statement in opposition to jurisdiction, the appellees attempt to distinguish cases cited by appellant which show that similar ordinances have been held unconstitutional by the courts of other states. Notwithstanding the appellees' argument to the contrary, the Supreme Court of Wisconsin itself, in the case at bar, in 43 N.W. (2nd) at page 482, conceded that its decision is contrary to that of the courts of other states, wherein it stated:

> "The plaintiff contends that its inspection, with that of the Chicago Board of Health and spot checks by the United States Public Health Service, result in a product that is clean, pure and wholesome, and that it should be permitted to flow freely to market unburdened by duplication of inspection and that the restrictions in the Madison milk ordinance are prohibitive trade barriers and therefore unconstitutional under the Fourteenth Amendment and the Interstate Commerce Clause, art. 1, par. 8, cl. 3 of the United States Constitution. *The courts of some states have so held.* This court has held otherwise in *Dyer* v. *City Council of City of Beloit*, 250 Wis. 613, 27 N.W. 2d 733, in which it held valid an ordinance of the city of Beloit which contained the following provision: 'No pasteurized milk shall be sold in the city of Beloit which shall not have been pasteurized in approved plants within six miles from the intersection of State Street and E. Grand Ave. in the city of Beloit.'"

It is respectfully submitted that this Court has jurisdiction of the appeal.

Respectfully submitted,

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IN THE

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Appellees.

Appeal from the Supreme Court of the State of Wisconsin.

Appellant's Brief.

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SUBJECT INDEX.

	PAGE
Opinion of the Courts below	1
Statement of jurisdiction	2
Statement of the case	2
Specifications of errors	34
Summary of argument	37-42
Argument	42

I.

The five mile limitation and the twenty-five mile limitation each deprives appellant of its constitutional rights under the Fourteenth Amendment and the Interstate Commerce Clause of the United States Constitution 43

A. The limitations are arbitrary and unreasonable as a matter of fact 43

Defendant failed to prove and the court did not find that the five mile limitation was a necessary health measure. The Wisconsin Board of Health recommends the United States Model Milk Ordinance to the Cities of Wisconsin for adoption 43

Section 11 of the Model Milk Ordinance provides for reciprocal inspection of the milk sheds 43

Wisconsin Department of Agriculture and The Wisconsin State Board of Health, by general order 125, have adopted regulations equivalent to the United

States Model Milk Ordinance for interstate milk and declared it sufficient for all health purposes 43

Appellee's witnesses express their confidence in United States Model Milk Ordinance and it stands admitted that appellant's milk fully complies with the requirements of this standard 44

Section 7.15 of the Madison ordinance provides for reciprocal inspection of certified milk which belies appellees' contention that reciprocal inspection of other milk sheds for Grade A. milk is insufficient to protect the health of Madison citizens 44

Madison has been compelled for years to drink ungraded milk and that was true of Janesville until Janesville tore down the trade barriers by adopting the United States Model Milk Ordinance 44

Appellees' expert witnesses testified that the Model Milk Ordinance, if effectively inspected, is sufficient to guarantee safe, pure and wholesome milk 45

B. Madison does not have autonomy to prohibit interstate trade in violation of the United States Constitution 48

The purpose of the commerce clause was to destroy local trade barriers built on local pride and to protect local interest 48

This court, in 1890, held that Minnesota could not prohibit the shipment of fresh meat from Illinois on the ground that it had not been inspected by Minnesota. The court held that inspection by the State of Illinois was sufficient. This decision was before the federal government undertook to inspect meat plants 50

Congress has provided the funds for the United States Public Health Service and that federal agency evaluates inspection of respective milk sheds and furnishes the information free of charge to communities receiving the milk 56

Appellees' contention that each state is free to adopt its own economic policy does not justify the trade barriers in the case at bar because the State of Wisconsin has adopted exactly the opposite policy 57

C. The five mile and twenty-five mile limitations are not health measures. Madison cannot bar the sale of interstate milk for economic reasons, or to make its own inspection less burdensome or because of slight deviations of the Madison ordinance from the Chicago ordinance and the Model Milk ordinance 58

Both the trial and supreme courts in Wisconsin emphasize the fact that Madison is located in a great milk producing area. That fact does not justify the two trade barriers in question. Appellees admitted that they had taken no steps to satisfy themselves as to the purity of plaintiff's milk and did not propose to do so. The trial court and the Supreme Court of Wisconsin ruled in effect that it was immaterial whether plaintiff's milk was pure and sanitary or not or whether it was produced and processed under ordinances equivalent to Madison and regularly inspected by responsible municipal and state authorities 58

The decisions that incidental and indirect burden upon interstate commerce are permitted are not in point. The limitations in question are prohibitions of interstate commerce 63

The state may bar unpure foods coming in through interstate commerce but cannot bar pure, wholesome foods that are brought in through interstate commerce. Slight deviations are not sufficient to prohibit interstate commerce, otherwise the Interstate Commerce Clause would be a dead letter 63

The refusal of the Health Commissioner in Madison to take any steps to satisfy himself that the plaintiff's milk was pure and wholesome was arbitrary and discriminatory 66

D. The fact that Dean Milk Company sells its milk through distributors does not deprive it of its Constitutional rights. This court has ruled to the contrary 69

The contention was raised by the appellees in the courts below 69

Madison denied Dean Milk Company a license on the sole ground of its failure to comply with the five mile limitation 71

E. All other state courts except Wisconsin hold above limitations unconstitutional 73

All the decisions in the Supreme Court in the other states hold similar restrictions unconstitutional as arbitrary, discriminatory, interfering with interstate commerce and not necessary health measures.... 75

The case of Dyer v. City of Beloit, 250 Wis. 163, 27 N.W. 2nd, 733 relied upon by the Wisconsin Supreme Court in the case at bar, has been destroyed as an authority 78

II.

The twenty-five-mile limitation is a justiciable controversy in this case and the Supreme Court in

Wisconsin, in refusing to hold the twenty-five mile limitation unconstitutional, denied the appellant due process of law and the equal protection of the law.... 79

The Court's refusal to pass upon the twenty-five mile limitation on the ground that it was moot and on the further ground that the 950 farmers from whom plaintiff purchases its milk, were not party plaintiffs, denied the appellant due process of law; denied the appellant access to the courts of Wisconsin and in effect, affirms the validity of the twenty-five mile limitation. It affirms the validity of the twenty-five mile limitation by making it impossible for the appellant to have the question adjudicated in the Wisconsin Courts 79

The five mile and the twenty-five mile limitations are part and parcel of the same plan to keep outside milk out 82

Conclusion 85

CASES CITED.

Brimmer v. Rebman, 138 U. S. 78, 34 L. Ed. 862..... 51

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 50 S. Ct. 451 .....82, 83

Carter v. Commonwealth of Virginia, 321 U. S. 131, 64 S. Ct. 464 49

City of Abilene v. Tennessee Dairies (Texas) 1950, 225 S.W. (2d) 429 77

City of Greenville v. Cabell's, Inc. (Texas), 207 S.W. (2d) 898 69

City of Wenoka v. Rose Lawn Dairy (Okla.), 212 P. (2d) 1056 72

Dean Milk Co. v. City of Waukegan (1949 Ill.), 87 N.E. (2d) 751 75

Dyer v. City of Beloit, 250 Wis. 613, 27 N.W. (2d) 733 ..... 33, 41, 78

Dyer v. City of Beloit, 252 Wis. 249 79

Dyer v. City of Beloit, 333 U.S. 825, 68 S. Ct. 450 78

Fiske v. State of Kansas, 274 U. S. 380, 47 S. Ct. 655 82

Freeman v. Hewit, 329 U. S. 249, 67 S. Ct. 274 48

Grant v. Leavell, 259 Ky. 263, 82 S.W. (2d) 283 76

Higgins v. City of Galesburg (Ill.), 81 N.E. (2d) 250 75

Home Ins. Co. of New York v. Morse, 22 Wallace 445, 22 L. Ed. 365 84

H. P. Hood & Sons v. DeMond, 326 U. S. 525, 69 S. Ct. 657 ..... 59, 63

John P. King Mfg. Co. v. City of Augusta, et al., 277 U. S. 100, 48 S. Ct. 489, 72 L. Ed. 801 2

La Franchi v. City of Santa Rosa, 8 Cal. (2d) 331, 65 P. (2d) 1301 76

McLeod v. J. E. Wilworth Co., 322 U.S. 327, 64 S. Ct. 1022 46

Meridian v. Sippy, 54 Cal. App. (2d) 214, 128 P. (2d) 884 76

Milk Control Board of Pa. v. Eisenberg Farm Products, 306 U. S. 349, 69 S. Ct. 528 62

Miller v. Williams, 12 Federal Supp. 236 53

Moultrie Milk Shed Inc. v. Cairo (Ga. 1950), 57 S.E .(2d) 199 77

Nebbia v. N. Y., 291 U.S. 502, 54 S. Ct. 505 58
Prescott v. City of Borger, (Tex. App.) 158 S. W. (2d) 578 76
Schollenberger v. Pennsylvania, 171 U. S. 1, 18 S. Ct. 757, 43 L. Ed. 49 63
Savage v. Jones, 225 U. S. 501, 32 S. Ct. 715 ..... 40, 73
Sheffield Farms Co., Inc. v. Seaman, 114 N. J. L. 455, 177 A. 372 76
Southern Pac. Co. v. State of Arizona, 325 U. S. 761, 65 S. Ct. 1515 49
State ex rel. Larson v. City of Minneapolis, 190 Minn. 138, 251 N. W. 121 76
State of Minnesota v. Barber, 136 U. S. 313, 34 L. Ed. 455 ..... 50, 56
Urban v. Taylor (N.J.), 188 Atl. 232 66

FEDERAL STATUTES.

June 25th, 1948, C. 646, 62 Stat. 929, 28 U.S.C.A., 1257 (2) 2
42 U.S.C.A. Sec. 201, Etc. 57
21 U.S.C.A. Sec. 71, Etc. 56

WISCONSIN STATUTES.

Section 328.021 16
Secttion 269.56 81

WISCONSIN REGULATIONS.

General Order 125, Department of Agriculture, November 15, 1949 ..... 16, 39

TEXTS.

Opinions of the Attorney General of Michigan, Biennial Report of the Attorney General, 47-48, No. 0-5105, November 6, 1946 77

IN THE

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Appellees.

Appeal from the Supreme Court of the State of Wisconsin

APPELLANT'S BRIEF.

Opinion of the Courts Below.

The opinion of the Supreme Court of the State of Wisconsin is reported in 257 Wis. 308 and 43 N.W. (2nd) 480; the opinion of the Circuit Court for Dane County is not officially reported, but is found in the record at pages 1-18.

Statement of Jurisdiction.

(a) The jurisdiction of this Court is invoked under the Act of June 25, 1948, C. 646, 62 Stat. 929 of the Judicial Code, 28 U.S.C.A. Sec. 1257 (2), from a final judgment of the Supreme Court of Wisconsin entered the 30th day of June, 1950. The above cited Judicial Code provides that a final judgment rendered in the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon appeal."

There was drawn in question in this case the validity, under Section 8 of Article 1 and the 14th Amendment of the Constitution of the United States, of Sections 7.11 and 7.21 of the Madison, Wisconsin, city ordinances.

A city ordinance is a statute within the meaning of said Act of June 25, 1948, (28 U.S.C.A. Sec. 1257 (2)) for purpose of appeal to this court. *John P. King Mfg. Co.* v. *City Council of Augusta, et al.*, 277 U.S. 100, 48 S. Ct. 489, 72 L. Ed. 801.

(b) Judgment of the Supreme Court of the State of Wisconsin was entered on June 30, 1950, and an appeal was allowed by that court to this Court on July 25, 1950.

Statement of the Case.

This case involves the validity, under Section 8 of Article 1 and the Fourteenth Amendment of the Constitution of the United States the following sections of the Madison Milk Ordinance, to-wit:

Section 7.11 of the Madison Milk Ordinance:

> "It shall be unlawful for any person to bring into or receive into the City of Madison, Wisconsin, or its police jurisdiction, for sale, or to sell, or offer for sale therein, or to have in storage where milk or milk products are sold or served, any milk or milk product as defined in this ordinance from a source not possessing a permit from the Health Commissioner of the City of Madison, Wisconsin."
>
> "Only a person who complies with the requirements of this ordinance shall be entitled to receive and retain such a permit."
>
> "On the filing of an application for a permit with the Health Commissioner he shall cause the source of supply named therein to be inspected and investigations to be made. The Health Department shall not be obligated to inspect and issue permits to farms located beyond twenty-five (25) miles from the central portion of the City of Madison, otherwise known as the Capitol Square. • • •"

Section 7.21:

> "It shall be unlawful for any person, association or corporation to sell, offer for sale or have in his or its possession with intent to sell or deliver in the City of Madison, any milk, cream, or milk products as pasteurized unless the same shall have been pasteurized and bottled in the manner herein provided within a radius of five miles from the central portion of the City of Madison otherwise known as the Capitol Square, at a plant housing the machinery, equipment and facilities, all of which shall have been approved by the Department of Public Health."

Pleadings.

The Supreme Court of Wisconsin made the following summary of the pleadings:

> "This is an action by the Dean Milk Company, an Illinois corporation, against the City of Madison, Dr.

C. K. Kincaid, its health commissioner, Leonard Howell, its city manager, and its common council, for a declaratory judgment as to the constitutionality of two sections of the milk ordinance of said city providing substantially as follows: (1) No milk shall be sold as pasteurized milk in the City of Madison unless it has been pasteurized and bottled within a radius of five miles from the capitol square; and (2) the health department shall not be obligated to inspect and issue permits to farms supplying raw milk for sale in said city if said farms are located beyond twenty-five miles from the capitol square. Judgment was entered December 30, 1949, declaring: (1) That the five-mile limitation is constitutional, and (2) that in this action no justiciable controversy existed as to the twenty-five mile limitation and plaintiff's complaint was dismissed so far as it involved that question. Plaintiff appealed from the judgment.

"Plaintiff is engaged in distributing Grade A pasteurized milk and other milk products in Chicago and other communities in Illinois and southern Wisconsin, including some within Dane County. It purchases and gathers milk from approximately nine hundred fifty farms located in northern Illinois and southern Wisconsin. None of these farms is within twenty-five miles of Madison. It pasteurizes and bottles the milk so gathered in plants at Chemung and Huntley, Illinois. The exact distance from these plants to Madison does not appear in the record, but they are located beyond the Southern boundary of the state of Wisconsin which is approximately fifty miles from Madison. (The record shows Chemung Illinois is 65 miles and Huntley Illinois is 85 miles from Madison (R. 84.))

"On March 8, 1948, the plaintiff applied to the city of Madison for a license to sell its Grade A pasteurized milk and other milk products within the city. On March 12, 1948, its application for such license was denied. On November 20, 1948, plaintiff com-

menced this action for declaratory relief. While this suit was pending, and on August 27, 1949, the city of Madison adopted a new ordinance retaining the five-mile limitation and inserting the twenty-five mile limitation, which up to that time had not been a part of its milk ordinance. On October 1, 1949, plaintiff applied to the Madison Board of Health for nine hundred fifty farm application blanks. They were not forwarded. Plaintiff then filed an amended complaint attacking both the five-mile and twenty-five mile limitations. The defendants secured an order to show cause why all reference to the twenty-five mile limitation should not be stricken from the plaintiff's amended complaint. The trial court denied this order to show cause but ordered plaintiff to file a second amended complaint separating the two causes of action. Thereafter the plaintiff filed its second amended complaint."

This complaint contained the allegations of the original complaint, alleging that the plaintiff's milk complied with the requirements of the present Madison ordinance, except that it was not pasteurized within 5 miles of Madison; that it would be useless for the plantiff to make application under the new ordinance, because the defendants took the position that they were not obligated to inspect plaintiff's plant and issue it a license, because its pasteurization plant was not located within the 5 mile zone; that the plaintiff's milk and milk products were wholesome and Grade A as provided in United States Model Milk Ordinance promulgated by the United States Public Health Service; that it was inspected regularly by the inspectors of the Chicago Board of Health; that it fully complied with the Chicago Milk Ordinance; that the Chicago ordinance was equivalent to that of the Madison ordinance; that although the plaintiff made application on March 8th, 1948, the defendants had made

no attempt to inspect the said farms from which the plaintiff obtains milk, or to inspect its plant or the vehicles in which said milk is transported, and have made no attempt to satisfy themselves that said milk was produced, pasteurized and transported pursuant to the provisions of the city ordinance of the city of Chicago, which is equivalent to the Madison ordinance; that the defendants have taken no steps whatever to satisfy themselves as to the purity, quality, and sanitation of the plaintiff's milk, and do not propose to do so, and claim that they have the right to refuse to do so, and to bar the plaintiff from selling milk in the City of Madison, Wisconsin, solely because the plaintiff's milk is not pasteurized within the 5 mile zone; that Section 7.25 of the ordinance adopted August 27th, 1949, by the defendant city, provides:

> "This ordinance shall be enforced by the Health Commissioner in accordance with the interpretation thereof contained in the current edition of the United States Public Health Service Milk Code, a certified copy of which shall be on file in the city clerk's office, provided that in case of upward revisions, the provisions shall be interpreted according to the provisions expressed in this ordinance."

That Section 11 of the United States Public Health Service Milk Code above referred to reads as follows:

> "Milk and milk products from points beyond the limits of routine inspection of the city of ..... may not be sold in the city of ....., or its police jurisdiction unless produced and/or pasteurized under provisions equivalent to the requirements of this ordinance: provided that the health officer shall satisfy himself that the health officer having jurisdiction over the production and processing is properly enforcing such provision."

That the following comment is made by the United States Public Health Service following the proposed section:

> "It is suggested that the health officer approve milk or milk products from distant points without his inspection if they are produced and processed under regulations equivalent to those of this ordinance, and if the milk or milk products have been awarded by the State control agency a rating of 90 percent or more on the basis of the Public Health Service rating method."

That plaintiff's milk and milk products have been awarded a rating of better than 90 percent by the State Control Agency.

That the plaintiff sells its milk and milk products in the city of Chicago and over 200 other municipalities in the State of Illinois and the State of Wisconsin; that the health officer of the City of Madison without undue expense or inconvenience could long before this time have satisfied himself that plaintiff's milk is produced, pasteurized and distributed under health standards equal and equivalent to those prescribed by the present ordinance of the City of Madison, Wisconsin, and that said standards were being enforced by other municipalities, and by the plaintiff maintaining inspectors of said farms, pasteurization plant and delivery vehicles; and that the milk proposed to be sold by the plaintiff meets the requirements of the milk ordinance and standard code recommended by the United States Public Health Service, and prayed for a declaratory judgment, declaring the 5 mile limitation to be in violation of both the Fourteenth Amendment and the Interstate Commerce Clause of the United States Constitution. (R. 19-28.)

The defendants' answer was a general denial of most of the allegations and alleged that even though the plaintiff's milk was produced, pasteurized, and transported under ordinances equivalent to the Madison ordinance, that such facts were immaterial and further alleged:

> "Defendants admit they have taken no steps to satisfy themselves as to the purity, quality or sanitation of the plaintiff's milk and further admit that they do not propose to do so and that they claim they have the right not to do so and further have the right to refuse to grant any license to the plaintiff because the plaintiff's milk is not pasteurized within the five mile zone as provided in the Madison City Ordinances, and *also for other reasons.*"

Defendants further alleged:

> "Defendants deny that the health officer of the City of Madison could by any means other than continual inspection of the plaintiff's plants and of the several hundred farms which deliver to those plants satisfy himself that the plaintiff's milk is being produced, pasteurized and distributed in the manner required by the Ordinances of the City of Madison, and defendants allege that such continual inspection would create undue expense and inconvenience to the City of Madison. Defendants deny that inspection by the plaintiff or by other municipalities has any materiality in this controversy and further deny that they have any information or knowledge sufficient to form a belief as to whether the plaintiff's milk meets the requirements of the said Ordinances and Code prepared by the United States Public Health Service and defendants deny upon information and belief that the provisions of that ordinance and code are equivalent to the provisions of the Madison Ordinances" (R. 43-44).

The plaintiff in its second count incorporated most of the allegations in the first cause of action and alleged

that the defendants in their original answer had raised the objection that the inspection of the farms from which plaintiff obtained its milk would cause an undue burden to Madison because of the number and distance of the farms from Madison; that Madison adopted a new ordinance on August 27th, 1949, which provided in Sec. 7.11 that the health department would not be obligated to inspect and issue permits to farms located more than 25 miles from Madison; that the Madison health department took the position that it had an absolute right to refuse to inspect farms more than 25 miles distance and not to issue permits to said farms; that plaintiff's business was dependent upon obtaining milk from farms located more than 25 miles from Madison; that the said ordinance as interpreted by the defendants was a violation of the Fourteenth Amendment and the Interstate Commerce Clause of the United States Constitution; that the Health Commissioner of Madison could with little expense and little inconvenience satisfy himself that the farms from which the plaintiff obtained its milk were sanitary and operated in accordance with the provisions of the Madison ordinance, and prayed judgment that Sec. 7.11 of the Madison ordinance be declared unconstitutional (R. 28-33).

The defendants in their answer to the second cause of action in Count II admitted that the defendants' original answer contained the allegations of inconvenience and expense of inspecting the farms from which plaintiff obtained its milk, and alleged that any application by said farm owners supplying milk to Dean Milk Company to deliver milk in Madison, which milk had been pasteurized outside of the 5 mile pasteurization limit would be denied, and that:

"28. The defendants admit that they take the position that the Madison Health Department has a discretion as to the inspection of farms located more than 25 miles from Madison and the issuance of permits to such farms and that it has the right to deny the issuance of permits to such farms and to deny plaintiff the right to sell its milk products made from milk produced on such farms, in the City of Madison and also for other reasons. The defendants deny that said Ordinance or any part of it is in violation of the Constitution of the United States or any amendment thereto or of any provision of the Constitution of the State of Wisconsin."

"30. Defendants allege that in view of the great supply of milk available within a radius of 25 miles from the Capitol Square of the City of Madison, the provision of the Madison Ordinance that the City need not inspect or issue permits to farms located beyond that radius is entirely reasonable and a proper health regulation and that said provision aids the effectiveness of inspection by the City Health Department and minimizes the cost thereof to the City and its tax payers" (R. 50).

and denied that a controversy existed as to the validity of Sec. 7.11 (the 25 mile limitation) so long as Sec. 7.21, the 5 mile limitation, stood (R. 47-51).

Trial Court's Findings.

The trial court made the following findings of fact:

"4. That the plaintiff, Dean Milk Company, is engaged in the purchase of milk from farm producers and in the pasteurization thereof, and in the sale of said pasteurized milk to retail stores in cities and villages in the states of Illinois and Wisconsin; that on the 8th day of March, 1948, the plaintiff herein made application to the City of Madison for a license to distribute pasteurized Grade 'A' Milk, cream and

milk products in the City of Madison and that on or about the 12th day of March, 1948, the plaintiff, Dean Milk Company, was notified by the Health Commissioner of the City of Madison that its application for a license was denied.

5. That the application of plaintiff for said license was denied because plaintiff's pasteurization plant was located at Chemung, Illinois, more than five miles from the central portion of the City of Madison, otherwise known as the Capitol Square and at a distance of about seventy-five miles from Madison" (R. 53).

The United States Model Milk Ordinance and Code.

Dr. C. K. Kincaid, the City Health Commissioner for the City of Madison, Wisconsin, testified that in 1922 the U. S. Public Health Service, realizing that there was considerable discrepancy from community to community and state to state, felt that they should recommend some sort of a standard by which farms and plants would be required to set up reasonably similar requirements since milk was milk and that such an ordinance was framed and has been recommended to the communities ever since 1922; that it has been revised occasionally since that time (R. 59-60). That over the course of years between 1500 and 2000 cities have adopted the United States Model Milk Ordinance and Code (R. 62).

The 1939 edition of the United States Model Milk Ordinance and Code was introduced into evidence as Exhibit 1 (R. 59), and we have set out the important parts at Record 161-193. In it we find the following "Foreword":

"The following milk ordinance and code, approved by the Public Health Service, Federal Security Agency, and the Bureau of Dairy Industry; U. S.

Department of Agriculture, is recommended for adoption by states and communities in order to encourage a greater uniformity of milk-control practice in the United States.

This ordinance and code embodies the best information at present available on milk-control legislation, but it should be considered subject to change as improvements are developed.

In order that it may have at its command the technical advice of a comprehensive group of experts in the various phases of the public health control of milk and milk products, and in allied problems relating to production, processing, and distribution, the United States Public Health Service has appointed a board of consultants, termed the Public Health Service Sanitation Advisory Board, composed of the following members:"

Here follows a long list of state health officers, sanitary engineers and experts from all over the country.

"The milk code should be used as the legal interpretation of the ordinance.

"A list of communities in which the milk ordinance recommended by the Public Health Service is in effect is issued from time to time by the Public Health Service. Inclusion in this list means that the State health department has reported that the milk ordinance in effect in that community is the Public Health Service milk ordinance without downward revisions, or changes in grade names, or significant changes in the form of the ordinance. Upward modifications do not bar from inclusion, but should be contemplated with extreme caution in order not to render the ordinance unenforceable. In the interest of national uniformity it is recommended that no changes be made in this ordinance when adopted locally unless upward revision is necessary to avoid

conflict with State laws. State health departments are requested to use the above rules in making reports to the Public Health Service."

The Model Milk Ordinance has been revised as of April, 1949, which was introduced in evidence (R. 59) as Exhibit 2. We have set out some of the important changes between the latest revision and the 1939 edition (R. 193-195).

In short, the Model Milk Ordinance and the revised edition set forth complete technical regulations for the sanitation of the farms, cows, health and cleanliness of the persons handling the milk, cooling, transportation, pasteurization, bottling, and temperature and sanitation in the distribution of milk and milk products. It defines Grade A pasteurized milk and milk products which is recognized as the highest standard all over the country. (Except certified milk used in infant care and sickness.)

The U. S. Model Milk Ordinance and the revised edition in Section 11, state the duty of the local health officer in regard to milk coming into his city from points beyond his routine inspection. This provision is recommended to safeguard the local community as to interstate milk and to make it possible for pure, wholesome sanitary milk to flow freely in interstate commerce. Section 11 of the 1939 edition and the suggestion of the United States Public Health Service (Exhibit 1) is as follows:

> Sec. 11. *Milk and milk products from points beyond the limits of routine inspection.*—Milk and milk products from points beyond the limits of routine inspection of the city of.....may not be sold in the city of....., or its police jurisdiction, unless produced and/or pasteurized under provisions equivalent to the requirements of this ordinance; *Provided*, That the health officer shall satisfy

himself that the health officer having jurisdiction over the production and processing is properly enforcing such provisions.

This section is intended to permit the health officer to bar milk and milk products shipped in from great distances unless he can assure himself that they meet the provisions of the ordinance. Under no conditions should the health officer authorize the receipt of such shipments if arrangements cannot be made for supervision, unless an emergency exists, in which case permission should be given for its receipt, provided it is labeled "ungraded milk" when distributed.

It is suggested that the health officer approve milk or milk products from distance points without his inspection if they are produced and processed under regulations equivalent to those of this ordinance, and if the milk or milk products have been awarded by the State control agency a rating of 90 percent or more on the basis of the Public Health Service rating method (R. 191).

The revised edition makes the following provision:

Section 11. *Milk and milk products from points beyond the limits of routine inspection.*—Milk and milk products from points beyond the limits of routine inspection of the municipality of.....may not be sold in the municipality of....., or its police jurisdiction, unless produced and/or pasteurized under provisions which are substantially equivalent to the requirements of this ordinance and which are enforced with equal effectiveness as determined by a milk sanitation rating (R. 195).

It will be noticed that these sections refer to a rating of 90% or better. The United States Public Health Service in conjunction with the State health departments carry on at frequent intervals surveys of the efficiency of local health inspectors within their milk shed. In other

words, the United States Public Health Service evaluates the compliance of milk sheds with the provisions of the United States Model Milk Ordinance. The results of these surveys are furnished free of charge. To make it concrete, the United States Public Health Service in conjunction with the Illinois State Board of Health made an investigation of the Chicago milk shed which took the Chicago Milk Ordinance and determined first, whether it was the equivalent of the United States Model Milk Ordinance and second, if it was being enforced efficiently and then made a percentage rating of the sanitation on the farms and pasteurization plant. This information was, and is available to the Madison Health Department free of charge. In the case at bar, Exhibit 3, (R. 195-196) shows: (received in evidence R. 84)

> "The Bean Milk Company operating under permit from the Chicago Board of Health, *which has adopted the recommended milk ordinance and code of the Public Health Service,* is included in the last survey rating of the Chicago milk shed made cooperatively by the Public Health Service and the Illinois State Department of Public Health.
>
> "This survey gave a rating of raw milk sold to plants of 91.05% and a rating of pasteurization plants of 93.42%."

The United States Model Milk Ordinance and Code does not contain any mileage limitation upon the location of pasteurization plants or farms. Under the program of the United States Public Health Service each milk shed has its own inspectors. The United States Public Health Service inspects and evaluates the local milk ordinance and the local inspection service. If the local ordinance and local inspection service rates 90 per cent or better (R. 151-2) then section 11 of both the 1939 Edition of the

United States Model Milk Ordinance (R. 191) and the revised edition (R. 195) provide that a foreign or distant city may safely receive such milk without duplicating the inspection of the milk shed with its own inspection. This information is furnished without costs to the receiving city (R. 62-65, R. 150-153).

Wisconsin has adopted the United States Model Milk Ordinance and approved the rating service of the United States Public Health Service for interstate milk.

This case was tried in the Circuit Court for Dane County on October 10 and 11, 1949, and the opinion of that court was handed down December 13, 1949. Prior thereto on November 15, 1950, the Wisconsin State Department of Agriculture enacted General Order 125, entitled:

> *"Standards and regulations for the production and processing of milk and milk products for interstate shipment."*

Section 328.021 Wisconsin Statutes states that the courts, including the Supreme Court, shall take judicial notice of this regulation.

In the preface of this regulation is found the following:

* * * *

> "Now, for the first time, Wisconsin is making available a service which will provide inspection and continuous supervision for areas producing milk for the fluid markets in other states.
>
> "The people of other states and in the cities outside of Wisconsin seek a supply of high quality fluid milk in our state. They should not be expected or required to maintain their own inspection services in Wisconsin. Such states and cities, naturally, are

vitally interested in quality. *They want a milk supply that is pure and wholesome and which has been produced and processed under the highest quality standards from the standpoint of human health.* This is a just demand, and Wisconsin is in complete accord with such safeguards for the protection of public health.

"General Order No. 125 provides the machinery which will make it possible for our dairy plants to supply the demands of these out-of-state markets and give the people of those areas the *public health safeguards to which they are entitled. High sanitary standards are set up,* coupled with a close, continuous state inspection service by the Wisconsin State Department of Agriculture. This inspection will be supplemented by U. S. Public Health Service inspections to insure consumers throughout the United States that when they buy Wisconsin Grade A milk *they are getting milk which meets every human health and sanitation requirement.*

"The service provided by this order is primarily a service to milk consumers in the metropolitan centers throughout the United States. Service to Wisconsin producers and processers is secondary.

"The standards promulgated in the order have been modeled after the United States Public Health Service recommended ordinance and milk code, and its provisions are substantially the quivalent of this code.

"General Order 125 was *prepared jointly by* the Wisconsin State Department of Agriculture and the *State Board of Health.* The order has also been *approved* by the *State Board of Health.*"

* * *

"The plan calls for constant inspection and supervision of producing farms, plants, equipment and transportation facilities by competent milk sanitar-

ians employed by the Wisconsin Department of Agriculture. The State Board of Health will serve as the survey and certification agency and all ratings will be periodically spot-checked before publication by the Region V Office of the U. S. Public Health Service. In addition, the State Board of Health will serve in an advisory capacity to the program and will share in the responsibility for training of the milk sanitarians, plant managers and fieldmen."

City of Madison's expert witnesses testified that the Model Milk Ordinance provided for adequate inspection and the reciprocal provisions of Section 11 could safely be relied upon by the receiving city.

Dr. C. K. Kincaid, one of the defendants and City Health Commissioner of the City of Madison, testified (omitting the numerous objections, which were overruled).

Over the course of years there has been between 1500 and 2000 cities that have adopted the U. S. Model Milk Ordinance.

"Q. Doctor, in regard to Grade A pasteurized milk, in your opinion do you believe that the revised milk ordinance recommended by the United States Public Health Service, Exhibit 2, provides for reasonably adequate and safe regulation for the receiving city that receives milk? A. If this is enforced with effectiveness, yes. (R. 62.)

Q. Now, Doctor, I want to ask you about the enforcement of it. It is a fact that the United States Public Health Service, in conjunction with the state boards of health, conduct spot surveys and make tests to determine the efficiency of enforcement in the various areas of the country. That is enforcement in the producing area. Is that correct?

A. They do on request of a receiving city and they do routinely, sometimes, too.

Q. Your answer is yes, they do conduct tests in the producing area? A. Yes.

Q. And they will give the receiving city, free of charge, all of the information that they have on any producing area in question, is that correct?

A. Through the particular state board of health.

Q. Then you could request the State Board of Health here in Wisconsin to get the information for you, and they could get the information for you, is that correct?

A. Yes, sir.

Q. And get it for you free of charge?

A. Yes, sir.

Q. Where did my Exhibit 1 go to?

(Paper handed to counsel.) Now, Doctor, I call your attention to Section 11 of the model milk ordinance and will you read the ordinance, part of Section 11? A. (Reading.) 'Milk and milk products from points beyond the limits of routine inspection of the city of Blank may not be sold in the city of Blank or its police jurisdiction, unless produced and/or' (to the Reporter). I will give you this—'unless produced and/or (R. 63) pasteurized under the provisions equivalent to the requirements of this ordinance; provided that the health officer shall satisfy himself that the health officer having jurisdiction over the production and processing is properly enforcing such provisions.'

Q. Now, Doctor, will you read the suggestion that is made under Section 11 by the United States Public Health Service?

A. (Reading). 'It is suggested that the health officer approve milk or milk products from distant points without his inspection if they are produced and processed under regulations equivalent to those of this ordinance, and if the milk or milk products have been awarded by the State control agency a

rating of 90 per cent or more on the basis of the Public Health Service rating method. Subsection 29.'

Q. Now, Doctor, will you read Section 11 of Exhibit 2, 'Revised milk ordinance recommended by the U. S. Public Health Service'?

A. (Reading.) 'Milk and Milk Products From Points Beyond The Limits Of Routine Inspection. Milk and milk products from points beyond the limits of routine inspection of the municipality of Blank may not be sold in the municipality of Blank, or its police jurisdiction, unless produced and/or pasteurized under provisions which are substantially equivalent to the requirements of this ordinance and which are enforced with equal effectiveness as determined by a milk sanitation rating.'

Q. Now, the rating that they refer to is the 90 per cent, is that correct? A. Yes, sir. (R. 64).

Q. Now, Doctor, I will ask you as an expert in this field; In your opinion do you think that a city could safely follow the provisions of Section 11 of the milk ordinance and code, the original one, and the revised one?

• • •

A. Are you asking do I trust the United States Public Health Service?

Mr. Geffs: Q. That is it.

• • •

A. Yes, I think I can trust the United States Public Health Service.

Mr. Geffs: Q. And, in your judgment, a city could, with reasonable safety, follow the suggestions of this Section 11, is that correct?

• • •

A. I am not sure I understand the question. Would you repeat it?

(Last question read.)

Mr. Geffs: Q. And, in your judgment, a city could, with reasonable safety, rely and depend upon this Section 11? A. For the protection of the public health? (R. 65.)

Q. For the protection of the public health.

A. It is a matter of opinion. I think so.

Q. That answers the question. Now, Doctor, when this ordinance was passed by Madison on August 27, 1949, prior to the passage of it you had some discussion, did you, with the council members and officials of Madison in regard to it? A. Yes, sir.

Q. Well, I call your attention to Section 7.21 which provides that pasteurization plants are to be within a 5 mile radius of the capitol square, and I will ask you if you recommended that as a measure?

• • •

A. There had to be some paragraph concerning the inspection of plants located beyond the usual limits of inspection and two paragraphs were submitted to the council for their decision since I felt that I wasn't competent to decide that by myself. This present paragraph 7.21 was one of those that was submitted.

Mr. Geffs: Q. Then, I take it you did not recommend it. You say you did not feel competent to decide the question. You did not recommend this—

A. I recommended that the council choose one of the two paragraphs.

Q. What was the other one? A. The other one was similar to the Section 11 of the standard ordinance.

Q. But you did not make a definite (R. 66) recommendation that they accept this Section 7.21, the 5 mile limitation on the pasteurization plants?

Mr. Hanson: He just said he did.

Mr. Geffs: No, he said he submitted two.

Mr. Hanson: In the alternative.

Mr. Geffs: Let's let the doctor answer.

A. *I did not specify which I preferred because I felt that milk to the consumers in Madison would be safeguarded adequately were either of those two selected.*" (R. 67.)

And *Edward R. Friday,* the Senior sanitarian of the City Health Department of Madison, also testified:

"Q. You say 'trustworthy organizations'. In your opinion, the U. S. Public Health Service is a trustworthy organization?

A. To the best of my experience, it is" (R. 128).

Clarence Luchterhand called by the defendants is the Milk Sanitarian for the Wisconsin State Board of Health. He testified that the Wisconsin Department of Public Health recommends the United States Model Milk Ordinance and Code to the cities of Wisconsin for adoption and the Wisconsin Department of Public Health recommends Section 11 of the U. S. Model Milk Ordinance and Code; and that a municipality in receiving milk from distant points may safely rely upon a rating of 90% or more made by the United States Public Health Service; (R. 150-151), that the department had received ratings from the Chicago Milk shed and it showed for raw milk sold to plants 91.05%, pasteurization plants 93.42% and an average of 92.24% and that those ratings were satisfactory (R. 151-152).

Mr. Luchterhand read into the record the following from Exhibit 42, a booklet entitled, "Methods of Making Sanitation Ratings of Milk Sheds": (received in evidence R. 150)

Q. Referring to page 13? A. Page 13, Significance of Ratings.

Q. Would you read that, please? A. "These ratings are compliance ratings and not safety ratings. A high rating does not necessarily mean that all of the milk supplies sold in the community in question are safe, nor does low rating necessarily mean that all of the milk supplies sold in a community are unsafe. Neither the present rating method nor any other rating method thus far devised is an absolute measure of safety. Nevertheless, a pasteurized milk rating of 90 per cent determined as previously described does mean that the pasteurized milk supplies in general of the community in question are as safe as a reasonably strict enforcement of the milk ordinance recommended by the Public Health Service will make them. Citizens who limit their purchase of milk to Grade A pasteurized milk secured from communities with 90 per cent ratings may, for all practical purposes, ignore the danger of milk-borne infection. *The safest communities from the standpoint of milk borne disease are those in which all milk is pasteurized and in which the pasteurized milk rating is* 90 *per cent or more*" (R. 147-148).

Mr. Luchterhand further testified that the health officer of a municipality receiving milk is justified in relying upon a rating report of the Public Health Service or the health officer can make his own check (R. 150).

Mr. Lutcherhand also testified that as a State Sanitarian of the Wisconsin Board of Health, he is now working in cooperation with the U. S. Public Health Service and he is doing that because the State Department of Agriculture of Wisconsin is trying to qualify milk to comply with the Model Milk Ordinance so that when it is approved as Grade A pasteurized milk by the Wisconsin State Board of Health it will be received outside of the State of Wisconsin; and he further testified that

there was now a big program in the Department of Agriculture here in Wisconsin to qualify the milk to meet the requirements of Grade A pasteurized milk under the Model Milk Ordinance (R. 155-156). That program resulted in General Order 125.

He further testified that Exhibit 2, the revised Model Milk Ordinance and Code, was now in full force and effect (R. 158).

Evidence Given By Other Experts in the Field.

Dr. W. J. Corbett, Director of Laboratory Personnel for the Dean Milk Company, holding a doctor's degree from the University of Wisconsin in dairy technology, testified that he had examined the Madison Milk Ordinance of August 27, 1949, section by section, and that Dean's Grade A pasteurized milk and milk products were produced, pasteurized and distributed under city ordinances equivalent to the Madison Milk Ordinance; that the products complied with the Madison Milk Ordinance with a few minor differences that were of no importance i.e. the cooling of the milk is slightly different but that was taken care of by the clump count (R. 82); he further said that in his opinion the 5-mile limitation and the 25-mile limitation in the Madison Ordinance were not necessary health measures.

H. J. Burger, Milk Inspector of Janesville, Wisconsin, testified that Janesville was operating under the United States Model Milk Ordinance; that in his opinion Section 11 of the U. S. Model Milk Ordinance providing for reciprocal inspection is a sound health measure, and that in his opinion the 5-mile limitation is not a necessary health measure (R. 89).

He testified that under the old ordinance of Janesville, outside milk was not allowed and that "under the old ordinance we were unable to obtain Grade A pasteurized milk in Janesville. We did obtain Grade A milk under the new ordinance. The reason for that was Dean milk coming into Janesville marked Grade A practically compelled our dealers to do likewise, and become Grade A for competitive purposes" (R. 90).

He further testified that the Janesville Ordinance made no restriction as to the location of farms (R. 91).

Dr. Fred B. Welch, the Health Commissioner of Janesville, Wisconsin, testified that in his opinion the 5-mile limitation and the 25-mile limitation were not health measures (R. 93).

James H. Davis, Inspector of Farm Relations for the Dean Milk Company, with a B.S. degree from the University of Illinois, majoring in dairy production, testified that in his opinion the farms and equipment from which Dean obtained its milk complied with health standards of the Madison Ordinance (R. 98).

Robert Alder testified that he was the distributor for the Dean Milk Company in Southern Wisconsin; that he owns a milk plant of his own at Elkhorn, Wisconsin, and that it was licensed by the Wisconsin Department of Agriculture and that he had a Bachelor's Degree in dairying from the Federal Technical Institute of Switzerland; that Dean's Grade A milk and milk products were sold in 18 cities and villages in Dane County and that he would not be distributing Dean's products unless he believed that they were pure, wholesome and sanitary; that he obtained Dean milk products in the State of Illinois, brought them across the state line and sold them to stores in Wisconsin (R. 103, 104).

Park Livingston testified that he was an attorney-at-law and Vice-President of Dean Milk Company; that the Chicago inspectors take great pride in telling you that the Chicago City Ordinance is a Model United States Public Ordinance and Code. (R. 113).

Facts As to the Inspection of Dean's Milk.

The Dean pasteurization plants at Chemung, Illinois, and Huntley, Illinois, operate under permits of the Chicago Board of Health and under permits from the Illinois State Board of Health and the Illinois State Department of Agriculture; all of the farms from which Dean obtains milk operate under permits from the Chicago Board of Health.

These plants and farms are regularly inspected by the Chicago inspectors and the Chicago inspection is rated better than 90% by the United States Public Health Service as above pointed out, which means that in order for Dean to label its milk and milk products Grade A, that the provisions of the United States Model Milk Ordinance and Code are complied with 90% or better.

Dr. W. J. Corbett, Director of Laboratory personnel of Dean Milk Company testified that as each can of milk comes into the Dean plant from the Dean farms, it is opened and examined for odor; it is then dumped and regularly a sample is taken about twice a month for sediment tests; weekly for bacterial counts and the bacteria tests are the methylene blue test, and direct microscopic count, at least monthly (R. 80); and the laboratory pasteurized count on each sample of each producer's milk is run monthly.

He said that the sediment test is a test where a pint of milk is taken from the bottom of a can, forced through a small cotton pad for the purpose of determining whether the milk is free from dirt or filth. The bacterial counts are run to determine the compliance of the farms as to method of production, detection of diseased cows; unclean equipment and poor cooling; he testified that these tests are slightly more stringent than those required by the present Madison Ordinance (R. 80-81) He also testified that cities other than Chicago inspect Dean's plants and run spot checks on the farms; that the City of Kenosha, Wisconsin, recently checked about 500 farms and then issued a permit to the Dean Milk Company on August 11, 1949; that the Wisconsin Department of Agriculture recently made tests as to the purity and sanitation of Dean's milk from samples picked up at stores and delivery trucks; that these tests and tests made by Racine, Wisconsin, and other cities, show that the bacterial count is way under the number allowed by the present Madison Ordinance and that the butter fat count exceeds the requirement of the present Madison Ordinance (R. 82-83).

H. J. Burger, the local sanitary inspector of Janesville, Wisconsin, testified as follows:

> "I have made spot checks of the farms supplying milk to the Dean Milk Company; I have visited the Dean Milk plant twice and made two spot checks of farms at different times since they started supplying milk to Janesville" (R. 91).

He concluded that from his inspection he believed that the Dean Company was meeting the requirements of the Janesville Ordinance and he believed that he had done an adequate job of inspecting under the circumstances; that he had an opinion about the Chicago inspection and his opinion was that it was adequate (R. 92).

Dr. Fred B. Welch, Health Commissioner of Janesville, testified that he was familiar with the Chicago Milk Ordinance and that Janesville adopted the United States Public Health Milk Ordinance two years ago (R. 94); that there were minor details and insignificant variations between the Chicago Ordinance and the United States Public Health Ordinance which did not amount to very much and that you could accept either one of them and produce a good grade of milk (R. 95).

He further testified that he had heard Mr. Burger's testimony of the spot checks of the farms producing for the Dean Milk Company and in his opinion as Health Commissioner, those spot checks were sufficient (R. 96). He said that he had an opinion as to the efficiency of the inspection of the Chicago Board of Health based not only on the present, but over many years of close cooperation with them and that he could not speak highly enough for the Chicago Health Department (R. 97).

James H. Davis, the Director of Farm Relations for the Dean Milk Company, testified that he had charge of inspecting farms; that the Dean Milk Company has 7 inspectors under his supervision inspecting farms all the time and that each farm was inspected about once a month (R. 97);

that these inspections were in addition to the inspection of the cities and municipalities in which the Dean Milk Company sold milk;

that each farm has a permit from the Chicago Board of Health and that a copy is furnished to the Dean Milk Company which is available to any health officer who desires to inspect it (R. 98);

that the laboratory records showing the laboratory test for each farm is kept on file at the Dean Milk Company

and is available for inspection by any health officer (R. 99). He concluded by saying,

that he had examined the Madison Ordinance and the farms that produce milk for Dean substantially comply with the standards set forth in that ordinance (R. 101).

Additional Expert Testimony Given By Defendants-Appellees.

Dr. Louis Fauerback, testified that he was Assistant Health Commissioner of Madison, not in charge of milk inspection except in the absence of Dr. Kincaid; that his field was examination and immunization in the schools and assisting the Health Commissioner (R. 136);

that in his opinion the United States Model Milk Ordinance (Exhibit 1) was unreasonable because it is not a model in the sense that one calls for something perfect (R. 136-7).

He said he had discovered some differences between the present Madison Ordinance and the Chicago Ordinance; that the Madison Ordinance provided for selection of samples for testing, keeping records for inspection for the previous six months; and at any time an officer of the Health Department finds insufficient or inefficient equipment in the process of manufacturing, he shall be deemed guilty of violation of the ordinance; and he found no similar provision or was unable to find a similar provision in the Chicago Ordinance (R. 130).

He said that the Madison Ordinance took the average bacterial count from the last 3 samples and the Chicago from the last 4 samples (R. 130-131); that Madison requires inspection of dairy plant receiving stations monthly and Chicago every 6 months (R. 131); and further that

the Madison Ordinance allowed suspension on first violation if of serious enough nature and Chicago permitted suspension on the second violation (R. 131-132);

and in case of a shortage, Chicago could take all of the milk under its ordinance (R. 132). He also testified that

Madison provides 3 square feet of window space per stanchion and in new construction will require 4, Chicago requires 3 square feet of light per cow (R. 133-4); that Madison requires the manure to be pitched 50 feet from the barn and Chicago allows a 30 foot pitch (R. 133); that Madison requires a trap drain, Chicago doesn't have such a provision; that Madison requires 100 square inches of ventilation in the milk house, Chicago requires "well ventilated"; that Madison requires the facilities to heat the milk house, Chicago has no such requirement; that Madison requires milk to be cooled at 60°, Chicago requires cooling within one hour to 65° (R. 134).

Although Dr. Fauerback was of the opinion that milk which complied with the Chicago Ordinance would not meet the Madison Ordinance (R. 135), the trial judge was of the view that the differences pointed out by Dr. Fauerback were of no material significance in public health because the Court in its opinion said:

> "* * * counsel even argue the issue whether the 'methylene blue' or the 'plate count' is the preferable test to determine if the number of bacteria in milk exceeds 200,000 per c.c. * * *
>
> We shall not exhaust brain tissues on such wanderings (R. 5).
>
> * * * but 'blue test' or 'plate count'—a pitch of 50 or 30 feet from the barn—50° or 60° cooling— and such minute *ad infinitum*—go only to the question of

whether Madison or Chicago has the better kind of milk regulations as to health and sanitary requirements. These details as to how to produce and care for milk do not hit the constitutional issue of the 5-mile limit at all as we view it" (R. 6).

On cross examination, Dr. Fauerback's attention was called to Exhibit 2, the revised U. S. Milk Ordinance and Code, and he was asked if in his opinion whether a city in Southern Wisconsin could rely upon that in order to be reasonably safe in securing pure, wholesome, sanitary milk, and he answered that he did not think so (R. 137) but said *he was of the opinion from his study of the Chicago Milk Ordinance, that Grade A pasteurized milk produced and pasteurized under that ordinance is safe for human consumption if the inspections of the farms and the dairy plants are efficiently and adequately made and the laboratory tests are within the limitations of that ordinance* (R. 138-9). *He was of the opinion that southern cities buying milk in Wisconsin and relying upon the inspection up here were doing their duty in respect to the health of their citizens legally* (R. 138).

He said that he was acting health commissioner a number of times and under his administration, Grade A milk labeled as such was never sold in Madison; that he did not know whether Madison's old ordinance provided for Grade A milk or not; that up to the present time that he was testifiying, no milk sold in Madison under the new Madison ordinance was labeled Grade A milk and that he was of the opinion that milk sold in Madison today is safe for human consumption notwithstanding the fact that all of the provisions of the new ordinance are not being complied with (R. 142).

With reference to *Dr. Fauerback's* testimony in regard to cooling the milk immediately after milking to 60 de-

grees, the defendants' witness, Edward R. Friday, senior Sanitarian of Madison, testified that the Madison Ordinance required a plate count of 200,000 which means that the count of bacteria shall not exceed 200,000 when milk is delivered to the dairy; that the Chicago Ordinance had the same requirement and that if Chicago accomplished the same thing by slightly different methods, then the Madison Ordinance has been met (R. 124-5).

Dr. W. J. Corbett, testified for plaintiff-appellant on the same subject. He said that the purpose of the Madison Ordinance requiring milk to be cooled to 60 degrees was to keep the bacteria count down when it was delivered to the dairy; that both the Madison Ordinance and the Chicago Ordinance provided that the count should not exceed 200,000 per c.c.; which is popularly called the "clump count"; and that the Chicago Ordinance (for all scientific purposes) complies with the requirement of the Madison Ordinance (R. 79).

Harvey Thew, a witness for the defendants-appellees, testified that Grade A milk labeled as such is not sold in Madison today; that the present Madison Ordinance requires that milk be labeled; that his belief was that the health department has not had sufficient time to approve of all conditions of the Madison market for Grade A; that he had been in the milk business around Madison since 1926 and Grade A milk labeled as such has never been sold in Madison except for a few years, a number of years back, when the State of Wisconsin had a Grade A milk law (R. 121).

Dr. C. K. Kincaid, the Health Commissioner of Madison, testified that the Madison Ordinance of August 27, 1949, provided for Grade A pasteurized milk; that there

is no milk sold today in the City of Madison labeled Grade A, and that there was only one dairy out of five in Madison that could qualify as Grade A (R. 68). *Dr. Kincaid hoped to reach a 90% compliance within a year or so as to make it a Grade A milk shed* (R. 61).

The Circuit Court of Dane County found that the five mile limitation was constitutional, and a reasonable health regulation, that the five mile limitation did not violate the Interstate Commerce Clause of the Fourteenth Amendment to the Constitution of the United States. The trial court based its decision solely upon the decision of the Supreme Court of Wisconsin in the case of *Dyer* v. *City Council of Beloit,* 250 Wis. 613, 27 N.W. (2d) 733. The trial court did *not* find that it was a necessary health measure (R. 54).

As to the twenty-five mile limitation, the trial court held:

> "Dean Milk Company need not be concerned by where its farmer patrons live, so long as Dean is not pasteurizing, and has expressed no intent to pasteurize, within five miles of Madison. The question is completely academic and moot as to where Dean's milk comes from, if Dean is not going to sell in Madison—and Dean cannot sell in Madison without pasteurizing inside the five-mile limit, if Madison's five-mile pasteurization ordinance is valid—and we hereby hold it to be valid" (R. 18).

The Circuit Court of Dane County further held that it was not necessary for the court to pass upon the twenty-five mile limitation, because the Dean Milk Company was not a farmer, owned no farms, and the farmers from whom it purchased its milk were not parties to this action (R. 17).

On appeal the Supreme Court of the State of Wisconsin on June 30, 1950, entered judgment affirming the decision of the lower court, Justice Hughes dissenting.

Other pertinent facts will appear in our argument.

Specification of Errors.

I. That the Supreme Court of the State of Wisconsin erred in finding that the ordinance of the city of Madison, Wisconsin, which reads:

> "7.21. *Pasteurization Plants to be Within Five Mile Radius.* It shall be unlawful for any person, association or corporation to sell, offer for sale or have in his or its possession with intent to sell or deliver in the City of Madison, any milk, cream or milk products as pasteurized unless the same shall have been pasteurized and bottled in the manner herein provided within a radius of five miles from the center portion of the City of Madison otherwise known as the Capitol Square, at a plant housing the machinery, equipment and facilities, all of which shall have been approved by the Department of Public Health,"

is not a trade barrier and does not violate the right of contract guaranteed under the 14th amendment to the Constitution of the United States and did not deprive the appellant of its property without due process of law and did not deny the appellant the equal protection of the law under the 14th amendment to the Constitution of the United States.

II. That the said Supreme Court of the State of Wisconsin erred in finding that the said Section 7.21 above quoted from the ordinance of the City of Madison, Wisconsin, is not in conflict with Section 8, Article 1 of the Constitution of the United States generally known as the Interstate Commerce Clause of the Constitution.

III. That the Supreme Court of the State of Wisconsin erred in finding that said Section 7.21 of the ordinance of the City of Madison, Wisconsin, above quoted is a reasonable exercise of the police power of the City of Madison, Wisconsin.

IV. That the Supreme Court of the State of Wisconsin erred in not finding that Section 7.11 of the ordinance of the City of Madison, Wisconsin, which reads:

> "7.21 *Permits.* It shall be unlawful for any person to bring into or receive into the City of Madison, Wisconsin, or its police jurisdiction, for sale, or to sell, or offer for sale therein, or to have in storage where milk or milk products are sold or served, any milk or milk product as defined in this ordinance from a source not possessing a permit from the Health Commissioner of the City of Madison, Wisconsin.
>
> "Only a person who complies with the requirements of this ordinance shall be entitled to receive and retain such a permit."
>
> "On the filing of an application for a permit with the Health Commissioner he shall cause the source of supply named therein to be inspected and shall cause all other necessary inspections and investigations to be made. The Health Department shall not be obligated to inspect and issue permits to farms located beyond twenty-five (25) miles from the central portion of the City of Madison, otherwise known as the Capitol Square",

was a trade barrier and deprived the appellant of its property without due process of law, deprived the appellant of its right of contract and denied the appellant the equal protection of the law under the 14th amendment to the Constitution of the United States.

V. That the Supreme Court of the State of Wisconsin erred in not finding that said Section 7.11 of the ordinance of the City of Madison above quoted was in conflict with section 8, Article 1 of the Constitution of the United States commonly known as the Interstate Commerce Clause of the Constitution.

VI. That the Supreme Court of the State of Wisconsin erred in refusing to adjudicate appellant's rights in regard to said Section 7.11 of the ordinance of the City of Madison, Wisconsin; for failing to hold that said Section 7.11 was unreasonable, null and void and in violation of the appellant's constitutional rights under the 14th Amendment to the Constitution of the United States.

SUMMARY OF ARGUMENT.

I.

The five mile limitation and the twenty-five mile limitation, each, deprives Appellant of its Constitutional rights under the 14th Amendment and the Interstate Commerce clause of the United States Constitution.

A. The limitations are arbitrary and unreasonable as a matter of fact.

Appellant's milk meets all the requirements of the United States Model Milk Ordinance which is the equivalent of the Madison ordinance, and is inspected by responsible municipal and state governments which inspection is vouched for by the United States Public Health Service.

Three of the appellees' expert witnesses, including their chief health officer, gave expert opinions that milk produced, processed and delivered pursuant to the provisions of the United States Model Milk Ordinance and Code is safe and sanitary for human consumption.

Sec. 7.15 of Madison Ordinance which provides for reciprocal inspection of certified milk belies appellees' contention that reciprocal inspection is not to be trusted for other grades of milk.

Madison's limitations as to milk are just as unreasonable as similar limitations would be in the case of fresh meat.

Madison for years drank ungraded milk. At the time of trial no milk was sold in the city labelled Grade A. Janesville had similar experience until it tore down

the trade barriers and let outside milk in. That compelled the local dealers to clean up and become Grade A for competitive purposes.

It was granted by the trial court that Dean Milk complied with the Chicago Ordinance and Exhibit 3 from the United States Public Health Service proved that the Chicago Board of Health had adopted the recommended milk ordinance and code of the Public Health Service. Over two thousand cities have adopted the United States Model Milk Ordinance and Code.

The terse question is whether the competitive system guaranteed by the due process and the Interstate Commerce Clauses of the United States Constitution is to stand or not. If trade barriers can be built to protect local interest as to milk, they can be extended to fruits, vegetables, meats and other foods on the pretext that only local inspection can be trusted.

B. Madison does not have autonomy to prohibit interstate trade in violation of the United States Constitution.

Madison cannot prohibit interstate commerce because Congress has failed to act upon the subject. This doctrine was denied by this Court in the case of meat long before the federal government undertook the inspection of meat. The Public Health Service in 1922 undertook to take the chaos out of the inspection of milk. Congress has appropriated the money for the work of the United States Public Health Service and that agency's rating or evaluation of milk ordinances and the efficiency of inspection of milk sheds is generally recognized throughout the United States and was adopted and approved by the Wisconsin Department of Agriculture and the Wisconsin State Board of Health on November 15, 1949, by

General Order No. 125. General Order No. 125 declares that milk produced and processed in a milk shed with regulations equivalent to the Model Milk Ordinance and Code complies with "every human health and sanitation requirement" in interstate shipment. The doctrine that the due process clause permits each state to adopt whatever economic policy it deems reasonably necessary to promote its welfare is not applicable in this case because the State of Wisconsin has not authorized any city to grant local monopolies in the milk business and the only expression on the subject by the State of Wisconsin is General Order No. 125 which is diametrically opposed to local monopolies and trade barriers.

C. The five mile and twenty-five mile limitations are not health measures. Madison cannot bar the sale of interstate milk for economic reasons or to make its own inspection less burdensome or because of slight deviations of the Madison Ordinance from the Chicago Ordinance and the Model Milk Ordinance.

Both the trial and Supreme Court of Wisconsin emphasized the fact that Madison was in the center of a great milk producing area. Defendants-appellees admitted that they had taken no steps to inform themselves as to the purity, quality or sanitation of the plaintiff's milk and did not propose to do so. Defendants-appellees alleged that the health officer of Madison could not satisfy himself that milk sold in Madison was meeting the requirements of the Madison Ordinance except by Madison's own continual inspection. Appellees failed to prove it and the trial court made no finding to that effect. The trial and Supreme Courts of Wisconsin treated as immaterial the fact that Dean's milk was produced and pasteur-

ized under ordinances, the equivalent of the Madison Ordinance, and that each step was inspected by the inspectors of responsible municipal and state governments. Both courts took the position that Madison had full discretion in the matter which could not be interfered with by the courts.

The Madison ordinance is not an incidental burden upon interstate commerce but is a prohibition of interstate commerce altogether. The decisions of this court do not permit prohibition of pure, wholesome food shipped in interstate commerce.

The trial court made no finding that there was any substantial upward revision of the Madison Ordinance over the Model Milk Ordinance or the Chicago Ordinance and such finding, if it had been made, would not have been supported by competent and creditable testimony.

The action of the Madison Health Officer in refusing to take any steps to satisfy himself that appellant's product was pure and wholesome was arbitrary and discriminatory.

D. The fact that Dean Milk Company sells its milk through distributors does not deprive it of its Constitutional rights.

The above proposition was thoroughly established by this court in the case of *Savage* v. *Jones*, 225 U.S. 501, 32 S. Ct. 715.

No contention was made in the trial court or the Supreme Court of Wisconsin that the method by which Dean Milk Company distributed and sold its milk deprived it of its constitutional guarantees.

E. The decisions of the state courts except Wisconsin hold the above limitations unconstitutional.

All the decisions of all the courts everywhere have held such limitations unconstitutional on the ground that they are arbitrary, discriminatory, not necessary health measures and violative of the Interstate Commerce Clause of the Constitution.

The Wisconsin Supreme Court relied upon its earlier decision of *Dyer* v. *City of Beloit*, 250 Wis. 613, 27 N.W. 2nd, 733. The later history of that case discredits it as an authority.

II.

The twenty-five mile limitation is a justiciable controversy in this case, and the Supreme Court of Wisconsin in refusing to hold the twenty-five mile limitation unconstitutional, denied the appellant due process of law and the equal protection of the law.

Dean Milk Company obtains its milk from 950 farms located more than twenty-five miles from Madison. The excuses of the Wisconsin courts in refusing to pass upon this limitation that (1) the question was moot so long as the five mile limitations existed, and (2) the 950 farmers were not made party plaintiffs, operates to deny the appellant access to the Wisconsin courts to have its rights declared.

The 950 farmers are not proper parties because they do not propose to sell milk in Madison and the Wisconsin courts would not grant relief anyway even if they were made parties on the ground that the five mile limitation makes the twenty-five mile limitation a moot question.

Failure of the Wisconsin courts to declare this limitation unconstitutional under the circumstances operates to affirm the validity of the twenty-five mile limitation and denies the appellant access to the Wisconsin Courts. Both the five-mile limitation and the twenty-five mile limitation are part and parcel of the same plan to keep outside milk out.

Conclusion.

That the judgment of the Wisconsin Supreme Court should be reversed with directions that the plaintiff be granted the relief prayed for in its complaint in the trial court of Dane County, Wisconsin.

ARGUMENT.

I.

The five-mile limitation and the twenty-five mile limitation, each, deprives Appellant of its Constitutional rights under the Fourteenth Amendment and the Interstate Commerce Clause of the United States Constitution.

A. The limitations are arbitrary and unreasonable as a matter of fact.

Defendants-appellees base their prohibition of interstate commerce upon the proposition that the *five mile limitation was a necessary health measure.* The defendants failed to prove this defense and the court did *not* so find. *Dr. C. K. Kincaid,* Health Commissioner of Madison, testified that the United States Model Milk Ordinance, and Section 11 thereof providing for reciprocal inspection provided adequate and reasonable means for insuring pure, wholesome and sanitary milk and milk products; the same testimony was repeated by another defense witness, Clarence Luchterhand, Milk Sanitarian for the Wisconsin State Board of Health. He went much further. *He stated the Wisconsin Board of Health recommends the United States Model Milk Ordinance to the cities of Wisconsin for adoption* (R. 150). *Further, the Wisconsin Board of Health and Wisconsin Department of Agriculture are now working on a program with the United States Public Health Service to obtain a United States Public Health Grade A label for Wisconsin milk so that it can flow freely in interstate commerce. It was adopted as General Order* 125 *of the Wisconsin Department of Agricul-*

ture, with the approval of the Wisconsin State Board of Health. The irony of the situation is that the government of Wisconsin's capital city pretends to believe that it is necessary to wall the city in and keep out interstate commerce although the appellees were unable to find any expert witness that would testify to it. *Madison's own city ordinance belies their position for Section* 7.15 *of the Madison Ordinance reads*:

> "Certified milk and Grade 'A' Raw Milk for Pasteurization (1) Definitions. (a) Certified milk is milk which conforms with the requirements of the American Association of Medical Milk Commissions in force at the time of production and is produced under the supervision of a medical milk commission and of the State Board of Health or of the City Health Commissioner of Madison" (R. 249-250).

Thus we find Madison delegating to others the function of inspection of the highest type of milk provided for in its ordinance (R. 161) without the "protection" of the five-mile and twenty-five mile limitation, which the city now contends is so vital for ordinary milk.

In fact, Madison copied that section of its Ordinance from the United States Model Milk Ordinance (R. 171).

We are now compelled to ask how the appellees can contend that such trade barriers are reasonable when the Health Commissioner of Madison, Dr. Kincaid, testified that the reciprocal inspection method set forth in Section 11 of the Model Milk Ordinance provides adequate protection to insure wholesome and sanitary milk; and said fact is confirmed by another defense witness, Clarence Luchterhand, Sanitarian for the Wisconsin State Board of Health? Such contention violates reason and is a farce.

The United States Public Health Service in conjunction with the *State Board of Health evaluates the inspection*

of the various milk sheds and makes this information available free of charge.

Dr. Kincaid, Madison's Health Commissioner, *Edward R. Friday,* Senior Milk Sanitarian of the Madison Health Department, and *Clarence Luchterhand,* Milk Sanitarian of the Wisconsin Board of Health, *all three defense witnesses*—expressed their full confidence in the adequacy of the United States Public Health Service Regulations. The trial court obviously erred or misunderstood the point of this matter. He viewed it as a sectional matter only on which he proposed to guard the jealous pride of one community against that of another. He stated:

> "One municipality does not have to sacrifice its standards to those of another community which may be lower nor is one governmental unit necessarily compelled to yield its independence to another, even though the latter's gauges of inspection purport to be equal or slightly higher" (R. 7).

That is not the point at all. One community is not yielding its independence to another. Surveys of the inspection service are made and graded by the United States Public Health Service. If the grade is 90 per cent or better, then the receiving community may rest assured (quoting from "The Methods of Making Sanitation Ratings of Milk Sheds" which appellees' own witness Luchterhand uses as a hand book as milk sanitarian for the Wisconsin State Board of Health) that:

> "Nevertheless, a pasteurized milk rating of 90 per cent determined as previously described does mean that the pasteurized milk supplies in general of the community in question are as safe as a reasonably strict enforcement of the milk ordinance recommended by the Public Health Service will make them. Citizens who limit their purchases of milk to Grade A pasteurized milk secured from communi-

> ties with 90 per cent ratings may, for all practical purposes, ignore the danger of milk-borne infection. The safest communities from the standpoint of milk-borne disease are those in which all milk is pasteurized and in which the pasteurized milk rating is 90 per cent or more" (R. 148).

If Madison can draw a 25 mile barrier around itself as to milk, why can it not do the same as to fresh meat? According to defendants' witness Nichols, fresh meat is subject to contamination just the same as milk (R. 160). Why does Madison have to yield its independence to meat packed in Chicago, just because it bears a federal inspection label on it? Why can not Madison prohibit the sale of all meat except that produced and processed in Dane County? The answer is because the Interstate Commerce Clause was intended to level all local trade barriers built on local pride and for the protection of local interest against competition.

In *McLeod* v. *J. E. Dilworth Co.*, 322 U.S. 327, 330, 64 S. Ct. 1023, (1926) this court said:

> "The very purpose of the Commerce Clause was to create an area of free trade among the several states."

The record shows without contradiction that Madison has for years, and still is, forced to drink ungraded milk. The same was true of Janesville until Janesville tore down the trade barrier and let in outside competition. The testimony of the Janesville milk inspector supports this contention, he having said:

> "Before Janesville adopted the new ordinance, outside milk could not be brought in. Under the old ordinance, we were never able to obtain Grade A pasteurized milk in Janesville. We did obtain Grade A milk under the new ordinance. The reason for

that was Dean Milk coming in to Janesville marked Grade A practically compelled our dealers to do likewise, and become Grade A for competitive purposes" (R. 90).

The trial court also stated:

> *"It is granted your company complies with the Chicago Ordinance and that you have good milk"* (R. 75).

And the United States Public Health Service in Exhibit 3, stated as follows:

> "The Dean Milk Company operating under permit from the Chicago Board of Health, *which has adopted the recommended milk ordinance and code of the Public Health Service* • • •" (R. 195-196).

We now find defendants' expert witnesses testifying that the United States Model Milk Ordinance and code is sufficient, and surely it is, because it has been adopted by 2000 cities—then why should Dean be barred from Madison when it stands admitted its products are wholesome and meet the test?

The terse question is whether the competitive system guaranteed by the due process and the Interstate Commerce Clauses of the Constitution is to stand or not. Or shall it be whittled away on one flimsy pretext or another? If trade barriers can be built to protect local interest as to milk, why can not they also be extended to fruits, vegetables, meats and other foods on the pretext that only local inspection can be trusted?

We say that such trade barriers are arbitrary and unreasonable as a matter of fact. They constitute a pernicious invasion of constitutional rights and guaranties and violate the spirit and letter of the commerce clause.

B. Madison does not have autonomy to prohibit interstate trade in violation of the United States Constitution.

On this subject the trial court erroneously stated:

> "The City of Madison—in the public concern over health—has an autonomy, a measure of local self-government, which, if exercised reasonably, need give way only to a constitutional enactment by the legislature of Wisconsin or the Congress of the United States, if such exists. None such does exist as yet" (R. 7).

The above pronouncement is based upon the mistaken idea that the States and their subdivisions may regulate or prohibit interstate commerce until Congress acts upon the subject. Such is not the law. The absence of State and federal legislation does not make Madison a privileged character. The Commerce Clause, *per se*, prohibits Madison from interfering with interstate commerce. The authorities in point are legion.

In *Freeman* v. *Hewit*, 329 U.S. 249, 67 S. Ct. 274, 276:

> "Our starting point is clear. In two recent cases we applied the principle that the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the *States, but by its own force created an area of trade free from interference by the States.* In short, the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States. *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 65 S. Ct. 1515, 89 L. Ed. 1915; *Morgan* v. *Virginia*, 328 U.S. ...., 66 S. Ct. 1050. In so deciding we reaffirmed, upon fullest consideration, the course of adjudication unbroken through the Nation's history. This limitation on State power, as the *Morgan* case so well illustrates, does not merely forbid a State to single out interstate commerce for

hostile action. A State is also precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between States. It is immaterial that local commerce is subjected to a similar encumbrance. It may commend itself to a State to encourage a pastoral instead of an industrial society. That is its concern and its privilege. But to compare a State's treatment of its local trade with the exertion of its authority against commerce in the national domain is to compare incomparables.

These principles of limitation on State power apply to all State policy no matter what State interest gives rise to its legislation. A burden on interstate commerce is none the lighter and no less objectionable because it is imposed by a State under the taxing power rather than under manifestations of police power in the conventional sense." (Italics ours.)

Again, in *Carter* v. *Commonwealth of Virginia*, 321 U. S. 131, 64 S. Ct. 464 at page 137 of U. S. Rep. and 468 of S. Ct. Rep., the court said:

"That clause remains in the Constitution as a grant of power to Congress to control commerce and as a diminution *pro tanto* of absolute state sovereignty over the same subject."

And in *Southern Pac. Co.* v. *State of Arizona*, 325 U.S. 761, 769, 65 S. Ct. 1515, 1520, it was said:

"For a hundred years it has been accepted constitutional doctrine that the commerce clause, without the aid of congressional legislation, thus affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests."

The proposition relied upon by the Supreme Court of Wisconsin that a local government may prohibit the law-

ful importation of articles in interstate commerce so long as Congress has not acted upon the subject has been clearly refuted by this Court. The case of *State of Minnesota* v. *Barber*, 136 U.S. 313, 34 L. Ed. 455, involved the sale of fresh meat. It is common knowledge that fresh meat is subject to contamination to an equal extent as milk, and the defendants' witness, Nichols, so testified in the case at bar (R. 160). The Minnesota statute prohibited the sale of fresh meat in Minnesota unless the animal had been inspected in Minnesota before slaughter. Barber was convicted of selling meat in Minnesota which had been slaughtered in Illinois. The State of Minnesota argued that it could not be determined whether or not the animal was healthy by merely inspecting the meat when it was offered for sale, and that the same could only be determined by inspection before slaughter. It also contended that it had a right to have this fact determined by its own inspectors and that it was too inconvenient and expensive for its inspectors to go to Illinois and other states to inspect animals before slaughter. This contention was rejected by this Court, and this Court stated at page 458:

> "On the contrary, the enactment of a similar statute by each one of the States composing the Union would result in the destruction of commerce among the several States, so far as such commerce is involved in the transportation from one part of the country to another of animal meats designed for human food, and entirely free from disease. * * * When to this is added the fact that the Statute, by its necessary operation, prohibits the sale, in the State, of fresh beef, veal, mutton, lamb or pork, from animals that may have been inspected carefully and thoroughly in the State where they were slaughtered, and before they were slaughtered, no doubt can remain as to its effect upon commerce among the several States. *It*

> *will not do to say—certainly no judicial tribunal can, with propriety, assume—that the people of Minnesota may not, with due regard to their health, rely upon inspections in other States of animals there slaughtered for purposes of human food.* If the object of the Statute had been to deny altogether to the citizens of other States the privilege of selling, within the limits of Minnesota, for human food, any fresh beef, veal, mutton, lamb or pork, from animals slaughtered outside of that State, and to compel the people of Minnesota, wishing to buy such meats, either to purchase those taken from animals inspected and slaughtered in the State, or to incur the cost of purchasing them, when desired for their own domestic use, at points beyond the State, that object is attained by the Act in question. Our duty to maintain the Constitution will not permit us to shut our eyes to these obvious and necessary results of the Minnesota Statute. If this legislation does not make such discrimination against the products and business of other States in favor of the products and business of Minnesota, as interferes and burdens commerce among the several States, it would be difficult to enact legislation that would have that result."

In *Brimmer* v. *Rebman*, 138 U.S. 78, 34 L. Ed. 862, the court held unconstitutional the statute of the State of Virginia which provided for inspection of meat that was transported more than one hundred miles after slaughter and for an inspection fee of one cent a pound. Rebman was convicted for the sale of meat from animals slaughtered in Illinois. The United States Supreme Court held the Virginia statute unconstitutional. The Court stated:

> "Is the Statute now before us liable to the objection that, by its necessary operation, it interferes with the enjoyment of rights granted or secured by the Constitution? This question admits of but one answer. The Statute is, in effect, a prohibition upon the sale

in Virginia, of beef, veal or mutton, although entirely wholesome, if from animals slaughtered one hundred miles or over from the place of sale. We say prohibition, because the owner of such meats cannot sell them in Virginia until they are inspected there; and being required to pay the heavy charge of one cent per pound to the inspector, as his compensation, he cannot compete, upon equal terms, in the markets of that Commonwealth, with those in the same business, whose meats, of like kind, from animals slaughtered within less than one hundred miles from the place of sale, are not subjected to inspection at all. Whether there shall be inspection or not, and whether the seller shall compensate the inspector or not, is thus made to depend entirely upon the place where the animals, from which the beef, veal or mutton is taken, were slaughtered. Undoubtedly, a State may establish regulations for the protection of its people against the sale of unwholesome meats, provided such regulations do not conflict with the powers conferred by the Constitution upon Congress, or infringe rights granted or secured by that instrument. But it may not, under the guise of exerting its police powers, or of enacting Inspection Laws, make discriminations against the products and industries of some of the States in favor of the products and industries of its own or of other States. The owner of the meats here in question, although they were from animals slaughtered in Illinois, had the right under the Constitution, to compete in the markets of Virginia upon terms of equality with the owners of like meats, from animals slaughtered in Virginia or elsewhere within one hundred miles from the place of sale. Any local regulation which, in terms or by its necessary operation, denies this equality in the markets of a State, is, when applied to the people and products or industries of other States, a direct burden upon commerce among the States, and therefore void."

The case of *Miller* v. *Williams*, 12 Federal Supp. 236 held unconstitutional a regualtion of the Health Commissioner of Baltimore City which prohibited the use or sale of cream for the manufacture of ice cream produced by dairies situated more than fifty miles from the City limits. The plaintiff, a citizen of Pennsylvania, with principal place of business at Philadelphia, sought an injunction against the regulation. The City defended upon the ground that "there are more than 4,000 dairy farms within the 50 mile limit from Baltimore and the number of available inspectors is, as a matter of reasonable expense, necessarily limited. With regard to distantly located dairy plants, for instance those in Wisconsin, it is said to be impossible to make such frequent inspections and to carry on such educational work as is possible within a limited distance from Baltimore City." Judge Chestnut held the regulation to be in conflict with both the Due Process and Interstate Commerce Clauses of the Constitution. In his opinion, he stated:

> "In my opinion the regulation is invalid, when attacked as unreasonable by a directly interested party producing milk within the State of Maryland (in the absence of a state statute) outside the zone or from the point of view of being a direct burden upon interstate commerce. From the latter aspect, the applicable principles of constitutional law are now well settled. Freedom of commerce between the states is the rule and not the exception. Under the Constitution it may be regulated by Congress but unless otherwise specifically so regulated, the states may exercise their police power by statute and may authorize their municipal corporations to do so by ordinances, provided the latter are reasonably adapted to the legitimate end of protecting the health, morals and welfare of the community. But

when local regulations under the guise of police power are not reasonably adapted to accomplish these legitimate ends and constitute a direct burden upon interstate commerce, they must fall, 12 C. J. 52, 60, 81. The principle here involved has been very recently applied by the Supreme Court of the United States to interstate shipments of milk in the case of *Baldwin, Commissioner* v. *Seelig*, 294 U. S. 511, 55 S. Ct. 497, 79 L. Ed. 1032. There a statute of New York which required a minimum price to be paid producers of milk within the State and further provided that no milk from other states should be sold in New York unless the same minimum prices were paid to producers in foreign states, was held unconstitutional as applied to interstate shipments of milk from Vermont, when sold in the original package, whether in the cans in which transported or as milk bottled therefrom. Said Mr. Justice Cardozo (294 U. S. 511, pages 521, 522, 55 S. Ct. 497, 499, 79 L. Ed. 1032):

'New York is equally without power to prohibit the introduction within her territory of milk of wholesome quality acquired in Vermont, whether at high prices or at low ones. * * * Such a power, if exerted, will set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported. Imposts or duties upon commerce with other countries are placed, by an express prohibition of the Constitution, beyond the power of a state, "except what may be absolutely necessary for executing its inspection Laws." Constitution, art. 1, § 10, cl. 2; *Woodruff* v. *Parham*, 8 Wall. 123, 19 L. Ed. 382. Imposts and duties upon interstate commerce are placed beyond the power of a state, without the mention of an exception, by the provision committing commerce of that order to the power of the Congress. Constitution, Art. 1 §8, cl. 3. "It is

the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business." * * * Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states. Such an obstruction is direct by the very terms of the hypothesis. We are reminded in the opinion below that a chief occasion of the commerce clauses was "the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation."'

* * *

"If the principle of this regulation is once established as to milk it could seemingly be extended to other food products such as vegetables, fruits and meats, which are likewise subject, although perhaps in less stringent degree, to food inspection and exclusion laws, but only when reasonable. * * * The result might well be that Baltimore would be made an isolated sanitary area for much of its food supply, although it is certainly not intended to suggest that such an unreasonable extension of the principle is at all likely to be proposed by our very efficient Health Commissioner. The principle, however, is one that runs directly counter to the constitutional freedom of the interstate commerce."

* * *

"The real objection of the Health Department to the foreign cream is based on the alleged impracticability of adequate and effective supervision by its own representatives of the dairy farms which produce the milk supply from remotely situated foreign dairy plants. This of itself is not a sufficient basis for excluding the cream although very probably it

would support regulations of a somewhat different nature than those applicable to the local supply which would afford every reasonable assurance to the Health Commissioner for the protection of the health of the community."

The case of *State of Minnesota* v. *Barber*, 136 U. S. 313, 34 L. Ed. 455, was decided in 1890, long before the Federal Government undertook to inspect meat in 1907. (21 U.S.C.A. Sec. 71, etc.)

It therefore follows that the argument that local government can absolutely prohibit the importation of perishable foods in interstate commerce in the absence of Congressional action to the contrary is not the law.

But we contend that Congress has taken some action in the milk situation. It is true that it has not taken the same type of action as in the case of meat. But Congress has appropriated the money and authorized the establishment of the United States Public Health Service in the Treasury Department. In 1922, the United States Public Health Service undertook to take the chaos out of the milk situation. At that time, a good many municipalities and states were inspecting milk, and instead of the Federal Government taking over directly the work of inspecting milk, it inaugurated a system of evaluating, or inspecting, the inspectors. Congress has continued to appropriate money for this service furnished by the Public Health Service, and the service has grown throughout the years. The proficiency of this service has become recognized throughout the United States. The State of Wisconsin by General Order 125 has declared that the system is not only sufficient but will "insure consumers throughout the United States that when they buy Wis-

consin Grade A milk, they are getting milk which meets every human health and sanitation requirement."

Now we submit that there is substantially no difference between the meat situation and the milk situation. In the case of meat, the Federal Government placed its own inspectors in the meat packing concerns, beginning in the year 1907. But by the year 1922, the Federal Government and the states and municipalities had developed a system of cooperation, so that in the case of milk, instead of the Federal Government furnishing the inspectors, it furnished a system that would evaluate and grade the local inspection, and furnish the information free of charge. Further, the Federal Government has established by the Model Milk Ordinance, standards so that milk which is stamped U. S. Grade A is milk, according to defendants' own witnesses, which is safe and sanitary, and according to the Wisconsin State Board of Health and the Department of Agriculture, "meets every human health and sanitation requirement," regardless of where it is produced in the United States. The Act of Congress establishing the Public Health Service and its functions is set forth in 42 U.S.C.A., Sec. 201 etc.

In their statement in opposition to jurisdiction by this Court, appellees argue that the Wisconsin Department of Agriculture does not have authority to prescribe regulations for cities in the State of Wisconsin. That is true. But what we are discussing here are health standards which are generally recognized in the milk industry and have been adopted by the State of Wisconsin insofar as the State of Wisconsin has acted upon the subject. The State of Wisconsin by General Order 125 has declared that milk certified as Grade A by the United States

Public Health Service "meets every human health and sanitation requirement" in interstate shipment. In other words, if it is all right for the other fellow, then why is it not good enough for the inhabitants of Wisconsin, including Madison? How can the State of Wisconsin adopt a policy declaring such milk pure and wholesome, when offering it for sale to citizens of other states, and at the same time maintain that milk having equal certification should be barred from coming into Wisconsin, because otherwise it would endanger the health of the citizens of Wisconsin? The answer is that such a contention is deception and hypocrisy.

The appellees in their statement in opposition to jurisdiction cite the case of *Nebbia* v. *N. Y.*, 291 U. S. 502, 54 S. Ct. 505, for the proposition that so far as the due process clause is concerned, a state is free to adopt whatever economic policy may reasonably be deemed necessary to protect or promote its public welfare. The answer to this contention is that the State of Wisconsin has not enacted a statute which puts milk dealers in the class of a public utility. In other words, there is no statutory policy in Wisconsin which creates or authorizes any city to create a monopoly in favor of local milk dealers. The only expression on the subject by the State of Wisconsin has been General Order 125, and that diametrically opposes local monopolies.

C. The five-mile and twenty-five mile limitations are not health measures. Madison cannot bar the sale of interstate milk for economic reasons or to make its own inspection less burdensome or because of slight deviations of the Madison Ordinance from the Chicago Ordinance and the Model Milk Ordinance.

The emphasis of both the trial court and the Supreme Court of the fact that Dane County is a large milk pro-

ducing county, and that it produces more than ten times the milk used in the city of Madison gives the key to the decision and the purpose of the Ordinance. The purpose of the limitations in the Ordinance is economic protection, and these regulations are not health measures.

This Court stated in *H. B. Hood & Sons* v. *Dumond*, 336 U. S. 525, 531, 69 S. Ct. 657, at page 531-532:

> "Our decision in a milk litigation most relevant to the present controversy deals with the converse of the present situation. *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U.S. 511, 55 S.Ct. 497, 79 L.Ed. 1032, 101 L.R.A. 55. In that case, New York placed conditions and limitations on the local sale of milk imported from Vermont designed in practical effect to exclude it, while here its order proposes to limit the local facilities for purchase of additional milk so as to withhold milk from export. The state agreed then, as now, that the Commerce Clause prohibits it from directly curtailing movement of milk into or out of the State. But in the earlier case, it contended that the same result could be accomplished, by controlling delivery, bottling and sale after arrival, while here it says it can do so by curtailing facilities for its purchase and receipt before it is shipped out. In neither case is the measure supported by health or safety considerations but solely by protection of local economic interests, such as supply for local consumption and limitation of competition. This Court unanimously rejected the State's contention in the *Seelig* case and held that the Commerce Clause, even in the absence of congressional action, prohibits such regulations for such ends."

In the case at bar the City of Madison drew two circles around itself, and absolutely prohibited all commerce originating beyond the limits of the circles. The first circle has a radius of five miles from the center of the

city, and declares that all milk not pasteurized within that radius is prohibited from being sold within the City of Madison. The second circle has a radius of twenty-five miles, and prohibits the sale of any milk in the City of Madison that is not produced on farms within that zone. It is true that as to the second circle, the City Ordinance purports to place a discretion in the Health Department by stating that the Health Department will not be obligated to inspect farms beyond the twenty-five mile limit, but the fact is that the Health Department will not inspect farms beyond the twenty-five mile limit, and milk which is obtained beyond that limitation cannot be sold in the City of Madison. The defendants state in their answer as follows:

> "Defendants admit they have taken no steps to satisfy themselves as to the purity, quality or sanitation of the plaintiff's milk and further admit that they do not propose to do so and that they claim they have the right not to do so, and further have the right to refuse to grant any license to the plaintiff because the plaintiff's milk is not pasteurized within the five mile zone as provided in the Madison City Ordinances, * * *." (R. 40-41).
>
> "Defendants deny that the health officer of the City of Madison could by any means other than continual inspection of the plaintiff's plants and of the *several hundred farms* which deliver to those plants satisfy himself that the plaintiff's milk is being produced, pasteurized and distributed in the manner required by the ordinances of the City of Madison, and defendants allege that such continual inspection would create undue expense and inconvenience to the City of Madison." (R. 42).

Notwithstanding appellees' allegation that continual inspection by Madison was necessary to insure pure and

wholesome milk for her inhabitants, appellees failed to prove it. The allegation is based upon the false assumption that no health officer or milk inspector, even though their work was vouched for by the United States Public Health Service, could be trusted except Madison's. The trial court made *no* finding that continual inspection by the City of Madison was necessary to insure the purity and sanitation of milk to be sold in Madison. In fact the trial court and the Supreme Court of Wisconsin treated the point as wholly immaterial.

Here is what the trial court said:

> "Dean's position on interstate commerce is set forth concisely in its reply brief (P. 6) in the present case:
>
> 'The test is, is the food or milk which the plaintiff proposes to sell a pure, wholesome product? If it is, it cannot be barred from interstate commerce.'
>
> "But the Supreme Court did not agree with this argument in the *Beloit* case, for with equal conciseness the court stated (P. 619):
>
> 'This ordinance does not violate the interstate commerce clause of the United States Constitution. Milk may be furnished from farms and pasteurization plants in the State of Illinois as well as in the State of Wisconsin, and in fact milk is so furnished. The production and delivery of milk are essentially local problems with which Congress has not sought to deal, leaving the City of Beloit free to act in the exercise of its police powers.' " (R. 12).

The Supreme Court of Wisconsin affirmed the trial court and stated in its opinion:

> "The plaintiff contends that its inspection, with that of the Chicago Board of Health and spot checks by the United States Public Health Service, results in a product that is clean, pure and wholesome, and

that it should be permitted to flow freely to market unburdened by duplication of inspection, and that the restrictions in the Madison Milk Ordinance are prohibitive trade barriers and therefore unconstitutional under the 14th Amendment and the Interstate Commerce Clause of the United States Constitution. *The courts of some states have so held.* This court has held otherwise in *Dyer* v. *City Council of Beloit,* 250 Wis. 613, 27 N.W. 2nd 733, in which it held valid an ordinance of the City of Beloit which contains the following provision:

'No pasteurized milk shall be sold in the City of Beloit which shall not have been pasteurized in approved plants within six miles from the intersection of State Street and East Grant Avenue in the City of Beloit.' "

We submit that the only fair inference that can be drawn from the above pronouncements of the trial and Supreme Court of Wisconsin is the doctrine that admission of milk in interstate commerce is a matter solely within the jurisdiction of the local authorities, and that it makes no difference how pure and wholesome or how thorough the inspection of the outside milk may be.

The mere statement of the proposition is its best refutation.

Counsel for the appellees in their statement in opposition to jurisdiction sought to bolster the Wisconsin Court's pronouncement by a quotation from the case of *Milk Control Board of Pa.* v. *Eisenberg Farm Products,* 306 U.S. 346, 69 S.Ct. 528, to the effect that every state police statute necessarily affects interstate commerce to some extent, but that such a statute does not run counter to the grant of Congressional power merely because it incidentally or indirectly involves or burdens interstate commerce.

The answer to that is that we are not dealing with a mere incidental burden upon interstate commerce. The sections of the Madison ordinance in question *prohibit interstate commerce altogether.*

Counsel for the appellees in their statement in opposition to jurisdiction by this Court attempted to further bolster the doctrine of the state Court by a quotation from *H. P. Hood & Son* v. *DeMond,* 336 U.S. 525, 531, 69 S.C. 657, 662, to the effect that a state may protect its inhabitants against perils to health, safety and fraudulent traders.

The answer to this proposition is that the Madison ordinance absolutely prohibits interstate commerce without regard to any question of health, safety or fraudulent traders. This Court has held in the case of *Schollenberger* v. *Pa.,* 171 U.S. 1, 18 S.Ct. 757, 43 L.Ed. 49, that a state may bar impure food or dangerous articles but it cannot bar from interstate commerce pure and wholesome food. This case struck down a Pennsylvania statute as being violative of the interstate commerce clause which prohibited the introduction and sale within Pennsylvania of oleomargarine. At page 12, Mr. Justice Peckham, speaking for a majority of the Court, stated:

> "The general rule to be deduced from the decision of this court is that a lawful article of commerce cannot be wholly excluded from importation into a state from another state where it was manufactured or grown. *A state has power to regulate the introduction of any article, including a food product, so as to insure purity of the article imported, but such police power does not include the total exclusion even of an article of food.*
>
> In *Minnesota* v. *Barber,* 136 U.S. 313, *it was held that an inspection law relating to an article of food*

was not a rightful exercise of the police power of the state if the inspection prescribed were of such a character or if it were burdened with such conditions as would wholly prevent the introduction of the sound article from other states. This was held in relation to the slaughter of animals whose meat was to be sold as food in the state passing the so-called inspection law. The principle was affirmed in *Brimmer* v. *Rebman,* 138 U.S. 78, and in *Scott* v. *Donald,* 165 U.S. 58, 97 (41: 632, 644).

Is the rule altered in a case where the inspection or analysis of the article to be imported is somewhat difficult and burdensome? Can the pure and healthy food product be totally excluded on that account? No case has gone to that extent in this court. The nearest approach to it was the case of *Peirce* v. *New Hampshire,* 46 U.S. 5 How. 504, involving the importation of intoxicating liquors. But in *Leisy* v. *Hardin,* 135 U.S. 100, the New Hampshire case was overruled, and it was stated by the present Chief Justice, in speaking for the court, that 'whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by state laws amounting to regulations, while they retain that character; although, at the same time, if directly dangerous in themselves, the state may take appropriate measures to guard against injury before it obtains complete jurisdiction over them. To concede to a state the power to exclude, directly or indirectly, articles so situated, without congressional permission, is to concede to a majority of the people of a state, represented in the state legislature, the power to regulate commercial intercourse between the states, by determining what shall be its subjects, when that power was distinctly granted to be exercised by the people of the United States, represented in Con-

gress, and its possession by the latter was considered essential to that more perfect union which the Constitution was adopted to create.'

To the same effect, we think, is the case of *Hannibal & St. J. Railroad Company* v. *Husen*, 95 U.S. 465, in which it was said that 'whatever may be the power of a state over commerce that is completely internal, it can no more prohibit or regulate that which is interstate than it can that which is with foreign nations.' The court, therefore, while conceding the right of the state to enact reasonable inspection laws to prevent the importation of diseased cattle, held that the law of Missouri there under consideration to be invalid, because it prohibited absolutely the introduction of Texas cattle during the time named in the act, even though they were perfectly healthy and sound.

The court said that a state could not, under the cover of exercising its police powers, substantially prohibit or burden either foreign or interstate commerce. Reasonable and appropriate laws for the inspection of articles, including food products, were admitted to be valid, but absolute prohibition of an unadulterated, healthy, and pure article has never been permitted as a remedy against the importation of that which was unadulterated and therefore unhealthy or impure.

We do not think the fact that the article is subject to be adulterated by dishonest persons in the course of its manufacture, with other substances, which it is claimed may in some instances become deleterious to health, creates the right in any state through its legislature to forbid the introduction of the unadulterated articles into the state. The fact that the article is liable to adulteration in the course of manufacture, and that the articles with which it may be mixed may possibly and under some circumstances be deleterious to the health of those who consume

them, is known to us by means of various references to the subject in books and encyclopedias, but there was no affirmative evidence offered on the trial to prove the fact. From these sources of information it may be admitted that oleomargarine in the course of its manufacture may sometimes be adulterated by dishonest manufacturers with articles that possibly may become injurious to health. Conceding the fact, we yet deny the right of a state to absolutely prohibit the introduction within its borders of an article of commerce which is not adulterated and which in its pure state is healthful, simply because such an article in the course of its manufacture may be adulterated by dishonest manufacturers for purposes of fraud or illegal gains. The bad article may be prohibited, but not the pure and healthy one."

Dr. Fauerbach, the assistant health officer of Madison in charge chiefly of the examinations and immunizations in the Madison schools, compared the Madison Ordinance with the Chicago Ordinance and found some slight differences. These differences were so trifling that the trial court in disgust stated:

"We shall not exhaust brain tissue on such wanderings (R. 5). * * * These details as to how to produce, and care for milk do not hit the constitutional issue of the five mile limit at all, as we view it" (R. 6).

The case of *Urban* v. *Taylor* (N.J.) 188 Atl. 232, deals not only with the above excuse but also with defendants' other excuses in the case at bar that there is sufficient milk in Dane County and that it would be too expensive and inconvenient for Madison to inspect Dean's plants and farms. The New Jersey Court stated:

"The town refused prosecutor's application because it would entail too great a financial burden to inspect

the source of supply. The Port Murray Dairy Company sells and distributes about 25,000 quarts of milk daily in various parts of North Jersey. It is supervised by the State Department of Health, and is inspected and approved by many municipal health boards. * * * Subsequently, the local board stated that it would refuse a permit because the town had already a sufficient supply to satisfy the needs of its inhabitants.

"The facts and circumstances in this case seem on all fours with *Sheffield Farms Co., Inc.* v. *Seaman*, 114 N.J. Law, 455, 177 A. 372, 375.

"It clearly appears that the refusal of the permit was without substance and is not predicated upon any desire to conserve the public health and safety. Mere lack of funds to investigate a source of supply is not sufficient reason to justify the refusal of a permit, in view of the circumstance that there seems to have been adequate inspection by state inspectors. Further, because the town already has a sufficient number of milk dealers presents no valid reason for a refusal of the permit requested."

On the ground, that the town had set up slightly different standards as to butter fat and bacteria count, the Court held that that was but an excuse, and not a legal reason, stating:

"It has been urged that in this case there has not been an exact compliance with the town requirements. The proofs clearly show reasonable compliance with the provisions of the ordinance essential to conserve the public health and safety. A local board of health, by incorporating in its ordinances arbitrary and unnecessary provisions, cannot preclude the prosecutor from engaging in a lawful business, merely on the theory that his milk and cream contains slightly less butterfat or the bacteria count is slightly different."

The Court further stated (which seems apropos to the case at bar), quoting from the *Sheffeld Farms* case:

> "Suffice it to say that the meager facts, relevant as to the occasion and history of the refusal, lead us to the conclusion that they are without substance. They are excuses rather than legal reasons. The city just took the position that it had enough milk dealers and that it had the situation 'well in hand.' Such a position is unreasonable; it is arbitrary, capricious, and discriminatory. It unlawfully curtails prosecutor's common-law right to engage in a lawful business, notwithstanding that it has fully complied with the requirements of the state and city. This the city cannot lawfully do."

If the appellees' position in the case at bar is correct, that a city may make some slight additional requirement, then of course a way has been devised of putting out of business a large milk company which deals in more than one city. Each city could make some slight difference in their ordinance and bar the company from doing business. For example, one city could require that the breezeway be left open, and the other require that it be closed. The answer to all of that is that this is not the test. The test is, whether the food or milk which the plaintiff proposes to sell is a pure, wholesome product? If it is, it cannot be barred from interstate commerce. The fact that more milk is produced in Dane County than is consumed in Dane County is no legal or health reason why interstate commerce should be barred. The defendants' argument in this respect shows the real motive is to prevent the plaintiff from selling milk in Madison for the purpose of avoiding local competition.

D. Action of Madison Health Commissioner in refusing to make any effort to satisfy himself that plaintiff's milk complied with Madison requirements was arbitrary, unreasonable and discriminatory.

On March 8, 1948, Dean applied for a milk license. On March 12, 1948, the Health Commissioner wrote Dean that its application was denied.

Defendants' answer to the second amended complaint alleges:

> "Defendants admit they have taken no steps to satisfy themselves as to the purity, quality or sanitation of the plaintiff's milk and further admit that they do not propose to do so and that they claim they have the right not to do so and further have the right to refuse to grant any license to the plaintiff because the plaintiff's milk is not pasteurized within the five mile zone as provided in the Madison City ordinances, and *also for other reasons*" (R. 40-41).

City of Greenville v. *Cabell's, Inc.* (Texas), 207 S.W. 2d, 898, was a suit by Cabell's, Inc., against the City of Greenville, *et al.*, for injunction against interference with the plaintiff's sale of milk in the city of Greenville. Judgment was entered for the plaintiff, and defendants appealed. The judgment below was affirmed. In this case, plaintiff made an application, like plaintiff here, to sell Grade A pasteurized milk within the city of Greenville. The health officer, there as here, did nothing about the matter, except to refuse to issue a permit. At page 900, the court stated that the health officer (between August 20, 1947, and September 23, 1947), made no inspection and did nothing except to make a trip to Austin for a conference with the state health officer, and then wrote a

letter to the health officer at Dallas. The court in its opinion said:

> "Dr. Jenks has made no investigation of Cabell's plant in Dallas, which the record shows to be about fifty miles distant from Greenville, nor has he conducted any investigation with reference to the source of Cabell's milk supply. On the other hand the record shows that Cabell's milk is Grade A pasteurized and Grade A pasteurized homogenized; that Cabell sells milk and milk products in the city of Dallas and several surrounding cities; that said plant and source of supply are examined by inspectors, both of the state and the city of Dallas at regular intervals; that its milk products have passed state and Federal inspections, and are being transported in interstate commerce."
>
> "Under the milk ordinances of said city, all that concerns Dr. Jenks and the city of Greenville is whether Cabell's milk and milk products meet the standard as fixed for said city in its milk code and ordinances. These facts, in our opinion, are amply shown by the record, as outlined above. Dr. Jenks testified that he had refused Cabell a permit, and another part of his testimony shows that he had failed to grant it a permit to sell milk and milk products in the city of Greenville. In a situation where a city health officer fails, after reasonable time to make a proper inspection in order to determine whether or not a permit to sell milk in the city should be granted, or whether he refuses a permit, an issue of fact is then presented for a court to hear and determine the issue, and when it is shown, as here, that Cabell's products met the requirements of the city milk code, then its right to a permit becomes clear, and a refusal to grant it, under such circumstances, becomes arbitrary."
>
> "Milk and other dairy products are legitimate subjects of commerce, and the right to sell them should

not be abridged by legislative boards further than reasonable to protect and safeguard the public health."

This language can be paraphrased here. It is apropos for defendants' witness, Luchterhand, sanitarian for the Wisconsin State Board of Health, testified that the State Board of Health recommended the Model Milk Ordinance. It was shown beyond dispute that the plaintiff's milk and milk products met all the requirements of the Model Milk Ordinance, and that it is regularly inspected by the city of Chicago, complies with the Grade A milk law of the State of Illinois, and although the defendant tried to show some slight differences between the Madison code and the Chicago code, yet no witness that the defendants produced would testify that the milk produced pursuant to the Chicago code and the Model Milk Ordinance was not pure, wholesome and sanitary. On the other hand, the defendant Dr. C. K. Kincaid, who is the health officer of Madison, testified that in his judgment the milk produced under the Model Milk Ordinance Exhibit 1 (not including the amendments, Exhibit 2) was safe from a health standpoint, and that he recommended to the city council either Sec. 11 or the provisions for limitations on plants and farms. In substance and fact Dr. Kincaid was satisfied that the reciprocal clause is a sufficient method to insure pure, wholesome milk. We thus have in this case the City of Madison barring the plaintiff's milk and milk products from sale within the city (which milk is shown to be pure, wholesome and sanitary), in direct violation of the Interstate Commerce Clause, when there is a simple and common method by which the City of Madison can now insure itself without any cost that the plaintiff's milk and milk products are being produced and pasteurized under sanitary methods; all of which

is perfectly satisfactory to its chief health officer, Dr. Kincaid. Such proof shows unreasonable and arbitrary action in fact.

It is admitted that plaintiff made application on March 8, 1948, and defendants admit in their answer of having made no effort whatsoever to satisfy themselves as to the purity and wholesomeness of plaintiff's products; and say they *do not propose to do so.* Under the above cited Texas case, the plaintiff is entitled to a declaratory judgment and a mandatory injunction giving it a right to sell its milk and milk products in the city of Madison without interference on the part of the defendants.

The defendants' action has become more arbitrary in view of Section 7.25 of the new ordinance of August 27, 1949, which reads:

> 7.25. *Enforcement Interpretation.* This ordinance shall be enforced by the Health Commissioner *in accordance with the interpretations thereof contained in the current edition of the United States Public Health Service Milk Code,* a certified copy of which shall be on file in the City Clerk's office; *Provided,* that in case of upward revisions, the provisions shall be interpreted according to the provisions expressed in this ordinance (R. 272).

In *City of Wenoka* v. *Rose Lawn Dairy* (Okla.) 212 P. (2d), 1056, the facts and situation were quite similar to the case at bar. The court held that such action on the part of the Health Officer was arbitrary; and that when the applicant's milk comes from a milk shed with a United States Public Health Service rating of 90 per cent or more the local health officer must accept it and can not take the position that he has not the funds or time to inspect himself.

E. The fact that Dean Milk Company sells its milk through distributors does not deprive it of its Constitutional rights.

On page eight of appellees' statement in opposition to appellant's statement of jurisdiction and motion to dismiss or affirm is contained the following statement:

> "The Dean Milk Company does not transport milk to or sell milk in the City of Madison or Dane County, nor does it propose to. It sells bottled, pasteurized milk to Robert Alder at Chemung, Illinois. Robert Alder transports the milk in his own refrigerated truck and sells it to stores in Wisconsin, including various communities in Dane County (R. p. 103)."

This same contention was made, and rejected by this Court in the case of *Savage* v. *Jones*, 225 U. S. 501, 32 Sup. Ct. 715, at page 720, where it is stated:

> "It is said that the complainant is not entitled to invoke the constitutional protection, in that he fails to show injury. * * * The argument rests upon the averment in the bill that his sales were made at Minneapolis, the goods 'to be delivered free on board of cars' at that point, 'and delivered to purchasers and consumers within the state of Indiana in the original unbroken packages, freight being paid thereon by the consumers and purchasers.' In answer, it must again be said that 'commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business.' * * * It clearly appears from the bill that the complainant was engaged in dealing with purchasers in another state. His product manufactured in Minnesota was, in pursuance of his contracts of sale, to be delivered to carriers for transportation to the purchasers in Indiana. This was interstate commerce, in the freedom of which from any unconstitutional burden the complainant had a direct interest. The protection accorded to

this commerce by the Federal Constitution extended to the sale by the receiver of the goods in the original packages. * * * An attack upon this right of the importing purchasers to sell in the original packages brought from the complainant not only would be to their prejudice, but inevitably would inflict injury upon the complainant by reducing his interstate sales, —a result to be avoided only through his compliance with the act by filing the statement and affixing to his goods the labels it required. According to the bill, the state chemist had threatened the complainant that, in default of such compliance, he would cause the arrest and prosecution of every person dealing in the article within the state, and had distributed broadcast throughout the state warning circulars. If the statute of Indiana, as applied to sales by importing purchasers in the original packages, constitutes an unwarrantable interference with interstate commerce in the complainant's product, he had standing to complain, and was entitled to relief against enforcement by the defendant of the illegal demands."

No contention was made in either the trial court or the Supreme Court of the State of Wisconsin that the method by which the Dean Milk Company distributed and sold its milk deprived it of the constitutional guarantees.

The record at 103-104 shows that the milk proposed to be sold in Madison is delivered in the original packages as it leaves the Dean plant at Chemung, Illinois. It was the Dean Milk Company that applied for a license to sell its milk and milk products in the City of Madison, Wisconsin, and it was denied a license on the ground that its milk was not pasteurized within five miles, as provided by Sec. 7.21 of the Madison Ordinance, and that its milk was not produced on farms located within twenty-five miles, as provided by Sec. 7.11 of the Madison Ordinance.

We contend that the method by which the Dean Milk Company sells its milk is immaterial. We contend that the Dean Milk Company has a constitutional right to sell its milk in Madison, Wisconsin, and it makes no difference whether it sells its milk directly or through distributors. The above case from this Court supports our contention.

F. All decisions of the State Courts except Wisconsin hold the above limitations unconstitutional.

We have carefully read every case on the subject and not one single case has held such or similar restrictions constitutional. All such ordinances have been held unconstitutional as a violation of both the Fourteenth Amendment and the Interstate Commerce Clause of the United States. The cases holding such ordinances unreasonable, null and void are as follows:

In *Dean Milk Company* v. *City of Waukegan*, (Ill.) 87 N.E. (2d) 751 (1949), the Illinois court not only held that the city has exceeded the statute, but that the regulation was *unreasonable*. Analysis of the Illinois cases shows that the cities may regulate under the Illinois Statutes so long as the regulations are reasonable. A violation of the Illinois Statute is also a violation of the Constitution. The *Waukegan* case held unconstitutional a city ordinance which barred the sale of milk in Waukegan which was not pasteurized and *produced* in Lake County, Illinois.

In *Higgins* v. *City of Galesburg*, (Ill.) 81 N.E. (2d) 520, held unconstitutional the city ordinance which barred the sale of milk not pasteurized within ten miles of the City of Galesburg.

In *State ex rel. Larson* v. *City of Minneapolis,* 190 Minn. 138, 251 N.W. 121, the court held unconstitutional the city ordinance of Minneapolis, which provided that milk could not be sold in Minneapolis unless it was pasteurized within the city limits. In that case, 97% of the milk and 99.1% of the cream consumed in the city were pasteurized in plants located within the city limits. The defense was made that it would place an undue burden upon the city to inspect the plaintiff's plant, which was located thirty miles from the city.

Again, in *Sheffield Farms Co., Inc.* v. *Seaman,* 114 N.J. L. 455, 177 A. 372, held it was arbitrary and illegal to bar the sale of plaintiff's milk in Perth Amboy, New Jersey, upon the ground that the city was already inspecting 21 duly licensed distributors, 350 licensed retailers, and 2000 separate sources of milk, and already had more milk than they knew what to do with, and set up the excuse that to inspect the plant of the plaintiff would cause undue burden, and so forth.

LaFranchi v. *City of Santa Rosa,* 8 Cal (2d) 331, 65 P. (2d), 1301, was an action for declaratory relief, and there the Court held unconstitutional an ordinance which prohibited the sale of milk in Santa Rosa which was pasteurized outside the city limits.

Meridian v. *Sippy,* 54 Cal. App. (2d) 214, 128 P. (2d) 884, held invalid an ordinance of the City of Stockton which prohibited the sale of milk that was produced beyond the boundaries of San Joaquin County.

Grant v. *Leavell,* 259 Ky. 267, 82 S.W. (2d) 283, held invalid an ordinance of Louisville which prohibited the sale of milk from plants located outside of Louisville.

Prescott v. *City of Borger,* (Tex. App.) 158 S.W. (2d) 578, involved an ordinance of the City of Borger, which prohibited sale of milk not pasteurized within the county. Plaintiff's plant was 60 miles away, and in another county. The Court held the ordinance in conflict with both the Texas statute and the Constitution.

Opinions of the Attorney General of Michigan, Biennial Report of the Attorney General, 47-48, No. 0-5105, November 6, 1946, holds that a city ordinance providing that no license shall be granted to a *milk producer whose dairy farm is more than thirty miles from the city of Midland, and whose plant is located outside of the city,* is violative of the constitutional rights of property and contract of a dealer whose plant is located outside the city. It is further discriminatory and invalid.

City of Abilene v. *Tennessee Dairies* (Texas 1950) 225 S. W. (2d) 429, holds unconstitutional an inspection fee of Abilene based upon the necessary cost of inspecting plaintiff's plant and the sources of milk on the ground that plaintiff's plant and sources of milk were being adequately inspected by municipalities at the source.

In *Moultrie Milk Shed, Inc.* v. *City of Cairo* (1950 Ga.) 57 S.E. 199, the Supreme Court of Georgia held unconstitutional and unreasonable a city ordinance which prohibited the sale of milk which was not pasteurized in the county. The court stated:

> "Where shall the line marking the limit to which legislation to protect the public health may encroach upon freedom of the individual to engage in competitive and legitimate business be drawn? Our decision here will constitute a precedent, a yardstick by which future similar questions must be decided. If this city is held by this court to be justified in restricting

> the trade in milk as is here done, it would constitute a precedent requiring a holding by this court tomorrow that all other cities could lawfully, upon the theory of protecting the public health, exclude foods such as syrup and pickles produced in Cairo from the markets in other cities unless they were processed in a plant situated within the county in which such cities are located. The most destructive enemy to free enterprise and individual liberty comes dressed in attractive garments, and is covered with a sugar coating in order that the victim will accept it unaware of its future destruction of his own freedom."

The Supreme Court of Wisconsin in its decision relied upon its earlier decision, *Dyer* v. *City of Beloit*, 250 Wis. 613; 27 N.W. 2nd 733. This decision held constitutional an ordinance which prohibited the sale of milk in Beloit, Wisconsin, which was not pasteurized within six miles of the city. The history of this case is as follows:

The appellant appealed that decision to this Court. This Court noted probable jurisdiction October 13, 1947, 68 S. Ct. page 87. Before the case was heard, however, the City of Beloit confessed error, amended its ordinance and gave the appellant, Dyer, a milk license and moved to have the case dismissed as being moot. This motion was opposed by Dyer on the ground that it would leave standing the decision of the Supreme Court of the State of Wisconsin and that under that decision the City of Beloit was left free to re-enact the ordinance in question. This Court in *Dyer* v. *City Council, City of Beloit* on February 2, 1948, 333 U.S. 825; 68 S. Ct. 450, vacated the judgment of the Supreme Court of the State of Wisconsin and remanded it with directions to that Court to proceed as it might deem appropriate. On March 19, 1948, on motion of the appellant to have the judgment of the Circuit Court

for Rock County reversed which originally the Supreme Court of Wisconsin had affirmed in holding the ordinance valid, that court in 252 Wis. 249, reversed the judgment of the Circuit Court for Rock County.

The Supreme Court of Wisconsin now says that regardless of what happened or what the mandates meant that the reasoning and logic of the original case of *Dyer* v. *City of Beloit* still stands.

We submit that when the appellees themselves in the *Dyer* case confessed error in this Court and this Court vacated the judgment that there was no reason or logic left to stand.

II.

The twenty-five mile limitation is a justiciable controversy in this case and the Supreme Court of Wisconsin in refusing to hold the twenty-five mile limitation unconstitutional denied the Appellant due process of law and the equal protection of the law.

The position of the trial court and of the Supreme Court that the appellant cannot have its rights adjudicated as to the twenty-five mile limitation because of the facts (1) that the question is moot so long as the five-mile limitation is valid, and (2) that the 950 various farmers from which the appellant purchases its milk in Northern Illinois and Southern Wisconsin are not party plaintiffs, violates the due process clause of the Fourteenth Amendment and denies to the appellant the equal protection of the law, because it virtually and in fact denies the appellant access to the courts of Wisconsin to have its rights adjudicated therein. The appellant purchases milk from approximately 950 farms. This milk is delivered to the appellant's pasteurization plants, is paid for and becomes the prop-

erty of the appellant. None of these 950 farmers are selling milk or proposing to sell milk in the City of Madison. They sell their milk to the Dean Milk Company, and they have no further voice in the matter as to what becomes of the milk after that.

Sec. 7.11 of the Madison Milk Ordinance prohibits the Dean Milk Company from selling milk in the City of Madison. It provides that:

> "It shall be unlawful for any person to bring into or receive into the City of Madison, Wisconsin * * * 'for sale or to sell or offer for sale therein or to have in storage where milk or milk products are sold or served, any milk or milk product as defined in this Ordinance from a source not possessing a permit from the Health Commissioner of the City of Madison, Wisconsin.' "

This section further provides that:

> "The Health Department shall not be obligated to inspect the farms and issue a permit to farms located more than twenty-five miles away."

This paragraph certainly means what it says, that the Dean Milk Company is prohibited from selling milk in the City of Madison, because the source of its milk is produced on farms that do not have permits. The section further provides that the Health Department will not be obligated to inspect and issue permits to farms more than twenty-five miles away. All of the farms from which the Dean Milk Company obtains its milk are more than twenty-five miles away, and as above quoted from the appellees' answer, the appellees will not inspect farms located more than twenty-five miles away, and in fact refuses to even furnish the plaintiff with the applications provided for in this section of the Ordinance (R. 312-313).

Sec. 269.56 of the Wisconsin Statutes is the Uniform Declaratory Judgment Act, and provides as follows:—

(1) "Courts of record * * * shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. * * * and such declaration shall have the force and effect of a final judgment or decree.

(2) "Any person * * * whose rights, status or other legal relations are affected by a * * * municipal ordinance * * * may have determined any question of * * * validity arising under the * * * ordinance * * * and obtain a declaration of rights, status or other legal relations thereunder.

(11) "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the right of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the attorney general of the state shall also be served with a copy of the proceeding and be entitled to be heard."

The appellant having applied for a license to sell its milk in the City of Madison, and having been denied the right on the excuse that its milk was not pasteurized within five miles of the City of Madison, and that its milk came from sources more than twenty-five miles away from the City of Madison, was entitled under this statute to have an adjudication of its rights, and a denial thereof is a denial of due process, and of the equal protection of the law, because it in fact denies the appellant access to the courts of Wisconsin.

Assuming that the appellant did persuade 950 farmers in Northern Illinois and Southern Wisconsin to start law suits in the City of Madison attacking the validity of the twenty-five mile limitation, the Wisconsin courts would refuse to pass upon the validity of the twenty-five mile limitation because the trial court plainly stated in his opinion, which is approved by the Supreme Court, that so long as the Dean Milk Company was not going to pasteurize within the five-mile zone, then the twenty-five mile question was moot.

How would the 950 farmers have any standing in the Wisconsin courts anyway, because they do not propose to sell milk in Madison? They sell their milk to the Dean Milk Company. It is the Dean Milk Company that proposes to sell milk in the City of Madison.

The decision compelling the appellant to submit to this section of the Ordinance, by refusing it a remedy, necessarily affirms the validity of this section as to appellant. *Fiske* v. *State of Kansas*, 274 U.S. 380, 47 S. Ct. 655.

This Court said in *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 50 S. Ct. 451 at page 453:

> "If the judgment is permitted to stand, deprivation of plaintiff's property is accomplished without its ever having had an opportunity to defend against the exaction. The state court refused to hear the plaintiff's complaint and denied it relief, not because of lack of power or because of any demerit in the complaint, but because assuming power and merit, the plaintiff did not first seek an administrative remedy which in fact was not available *and which is not now open to it*. Thus by denying to it the only remedy ever available for the enforcement of its right to prevent the seizure of its property, the judgment deprives the plaintiff of its property."

Applying this reasoning to the case at bar, the State of Wisconsin declines to declare the twenty-five mile limitation unconstitutional, not because of any demerit in the plaintiff's complaint, but because it says that the remedy is not available to the appellant, and that no remedy is now open to the appellant. If the appellant persuaded the 950 farmers to start their litigation, they would be turned out of court on the excuse that the five-mile limitation made the question moot anyway.

The Wisconsin courts have ample power under the declaratory judgment statute to give the appellant the relief that it is entitled to under the Constitution of the United States.

The *Brinkerhoff-Faris Trust & Savings Company* v. *Hill* opinion continues at page 454 as follows:

> "The Federal guarantee of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government. • • •
>
> "Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense—whether it has had an opportunity to present its case and be heard in its support. • • • whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right which the state has no power to destroy unless there is, or was, afforded to him some real opportunity to protect it."

Under the decision of the trial court, which is approved by the Supreme Court of Wisconsin, the appellant is denied all opportunity to have the twenty-five mile limitation declared unconstitutional and no opportunity is given to the appellant to protect its right in this matter.

In *Home Ins. Co. of N. Y.* v. *Morse*, 22 Wallace 445, 22 L. Ed. 365, at page 368:

> "Every citizen is entitled to resort to all of the courts of the country, and to invoke the protection which all laws of all those courts may afford him. A man may not barter away his life or his freedom or his substantial rights."

At Record 13 the trial court stated:

> "There certainly can be no interference with interstate commerce by an ordinance reciting that milk must be *pasteurized* within five miles of Madison. That requirement seizes upon the product after it has come to rest in the state. That is not a prohibition of interstate commerce. It is a purely local regulation."

That is the best argument that has been advanced to date why the twenty-five mile limitation is a justiciable issue in this case and why both limitations are part of the plan to keep outside milk out.

How can the milk that Dean proposes to sell in Madison come to rest within the five mile zone when Section 7.11 of the same ordinance prohibits the sale and storage of milk not produced within twenty-five miles of Madison?

Conclusion.

We submit (1) that both the five-mile limitation and the twenty-five mile limitation are in violation of the Interstate Commerce Clause and the 14th Amendment of the Constitution of the United States; (2) that this record establishes without dispute that appellant's Grade A milk and milk products are pure, wholesome, sanitary, meet all the requirements of the United States Model Milk Ordinance and Code, meet all reasonable requirements for pure and sanitary milk from cow to consumer, and are adequately and thoroughly inspected by responsible state and municipal governments; and (3) that the appellant is entitled to judgment reversing the judgment of the Supreme Court of the State of Wisconsin directing that court to declare the said limitations to be null and void and to direct the Circuit Court for Dane County, Wisconsin, to grant the prayer of the appellant's complaint in that court.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950.

No. 258

DEAN MILK COMPANY, a corporation,

Appellant,

vs.

CITY OF MADISON, WISCONSIN, a Municipal Corporation, **DR. C. K. KINCAID**, as Health Commissioner for the City of Madison, Wisconsin, **LEONARD HOWELL**, as City Manager of the City of Madison, Wisconsin, and **THE COMMON COUNCIL OF THE CITY OF MADISON, WISCONSIN**,

Appellees.

Appeal from the Supreme Court of the State of Wisconsin.

APPELLANT'S REPLY BRIEF.

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SUMMARY AND INDEX OF ARGUMENT.

I.

PAGE

Issue Involved 1

Appellees' answer offered as reasons for denial of appellant's license to sell milk in Interstate Commerce in Madison that it would be necessary for Madison to inspect Dean's plant and the farms from which Dean obtained its milk and that such additional inspection would place too heavy a burden on Madison's Health Department 1

The issues were the five mile and the twenty-five mile limitations necessary to protect the health of the citizens of Madison under the circumstances 6

Madison Health officer refused to make an effort to find out if Dean's Milk complied with the health requirements of the Madison Ordinance. He would not even furnish blanks so that the farms from which Dean obtained its milk could make application for permits 6

It is not appellant's position that it seeks to deprive communities of the right to inspect their milk supplies. But a community can not deny the sale of milk which meets its health standards in interstate commerce by refusing to inspect, and especially so when the United States Government has furnished free of charge a method by which such facts can be ascertained 7

It is not appellant's position that this court should assume legislative functions and declare the minimum standards of the United States Model Milk Ordinance shall be the maximum standards of any city milk ordinance in the country 8

Dean's milk meets the health requirements of the Madison Ordinance 8

Appellees failed to prove that there were any "upward revisions" of the Madison Ordinance over the standards of the revised Model Milk Ordinance which was in force at the time of trial 8

Experts testified that the five and twenty-five mile limitations are not health measures 9

Record shows that Madison or any other health department is welcome to inspect Dean's plants, farms and records 9

II.

The five mile and the twenty-five mile limitations are trade barriers 10

It is not economically possible to build a milk plant in every city or village 10

The opinion of Supreme Court of Wisconsin states that some courts have held such limitations trade barriers 10

Contrary to appellees' contention, the courts, Congress and the State of Wisconsin have treated milk as a subject of Interstate Commerce 11

The meat problem and the milk problem are fundamentally the same. Both require inspection 13

"Upward revisions" were not established. Dean's milk not only met the health requirements of the Madison Ordinance but excelled any milk that was being sold or had been sold in Madison for years. The trial court was of the opinion that such fact was immaterial 13

The courts have encountered no difficulty with the words "wholesome milk". Appellees' position is that they can rest smugly behind the five and twenty-five mile limitations regardless of what health standards outside milk might establish 14

The history of the litigation in regard to paper bottles does not support appellees' conditions in this case 16

The record shows that Dean's farms are inspected and supervised much more closely than Madison's farms 17

III.

Appellant seeks to have the judgment of the Supreme Court of Wisconsin reversed 18

Appellant is not asking this court to assume the functions of legislation, or to rule on hypothetical cases 18

IV.

Conclusion 20

The judgment of the Supreme Court of Wisconsin should be reversed with directions to declare the two limitations null and void and to grant the prayer of appellant's complaint 20

CASES CITED.

Baldwin v. Seelig, 294 U. S. 11, 55 S. Ct. 497, 79 L. Ed. 1032 15

Brimmer v. Rebman, 138 U. S. 78, 34 L. Ed. 862 11

City of Greenville v. Cabell's, Inc. (Texas) 1950, 207 S. W. (2d) 898 11

Dean v. Beloit, 68 S. Ct. 87 (No. 275 October Term, 1947) 17

Dean Milk Co. v. Chicago, 385 Ill. 565, 53 N. E. (2d) 612 16

Dyer v. Beloit, 250 Wis. 613 ..... 14, 17

Fielderest Dairies v. City of Chicago, 35 F. Supp. 451 (N.D. Ill.) 122 F. (2d) 132 (7th Cir.) 316 U. S. 168, 62 S. Ct. 986, 86 L. Ed. 1355 16

H. P. Hood & Sons v. DeMond, 326 U. S. 525, 69 S. Ct. 657 ..... 12, 13

Miller v. Williams, 12 Federal Supp. 236 12

FEDERAL STATUTE.

Agricultural Adjustment Act, Sec. 1, 8c (5) (G) as amended by Agricultural Marketing Act of 1937, 7 U.S.C.A. Secs. 601, 608 c (5) (G) 13

WISCONSIN REGULATION.

General Order 125 of Wisconsin Department of Agriculture 12

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Appellees.

Appeal from the Supreme Court of the State of Wisconsin.

APPELLANT'S REPLY BRIEF.

I.

ISSUE INVOLVED.

Appellees denied appellant the right to sell milk in interstate commerce in Madison on the ground that its five mile limitation was *necessary* to protect the health of the citizens of Madison. In its original answer, appellees allege:

"13. Defendants further allege that the ordinances attached hereto as Exhibit 1, and especially including the portion thereof set forth in plaintiff's complaint (the five mile limitation) constitute *necessary*, reasonable and proper health regulations for the protection of the lives and health of the residents of the city of Madison. * * * (R. 204).

"15. Defendants are informed and verily believe that approximately 200 or more farms located chiefly in the state of Illinois many miles from Madison, furnish milk to the Chemung, Illinois, plant of the plaintiff. Because it is impractical to segregate in such a plant the milk from particular farms delivering to the plant, in order to be assured that standards of milk production, processing and transportation required by the Madison ordinances are maintained as to any milk delivered from such plant to the city of Madison, it would be *necessary* for the city health authorities regularly to inspect the said plant *and the* 200 *or more farms delivering to it*, even if 'the amount of milk from said plant sold in the city of Madison is very small, as defendants are informed and verily believe.' (R. 206).

"18. Changing economic conditions frequently may cause operators of dairy plants which serve other than established local markets, and particularly operators of plants which may have a variety of markets available to them, to shift from market to market from time to time, as defendants are informed and verily believe. If plants so operated and located at a distance from Madison are permitted to supply milk to Madison, such operations and the frequent fluctuation in inspection responsibilities of the City in the inspection of said plants and the farms supplying them would unreasonably burden the City of Madison." (R. 207-208).

Thus we have the reason in the appellees' original answer for denying the appellant the right to sell milk in interstate commerce in Madison.

It will be noted that their reasons are: First, that it was *necessary* that Madison inspectors inspect appellant's plants and *the farms* from which appellant obtained its milk. Second, that it was too big a burden for Madison to inspect the said plants and *farms,* and, third, because of changing economic conditions appellant might shift to some other market anyway.

In appellant's second amended complaint, appellant alleged:

> "That although the plaintiff made application on March 8th, 1948, for a license to sell milk in said city of Madison, the defendants have made no attempt to inspect the said farms from which the plaintiff obtains milk, or to inspect its plant or the vehicles in which said milk is transported, and have made no attempt to satisfy themselves that said milk was produced, pasteurized and transported pursuant to inspections of the city ordinance of the City of Chicago, Illinois, which has provisions equivalent to that of the City of Madison, Wisconsin, as above alleged; * * * that the defendants have taken no steps whatsoever to satisfy themselves as to the purity, quality and sanitation of the plaintiff's milk, and do not propose to do so, and claim that they have the right not to do so, and to bar the plaintiff from selling milk in the City of Madison, Wisconsin, because the plaintiff's milk is not pasteurized within the five mile zone." (R. 24-25.)

The appellees in their answer replied:

> "Defendants admit they have taken no steps to satisfy themselves as to the purity, quality or sanitation of the plaintiff's milk and further admit that

they do not propose to do so and that they claim they have the right not to do so and further have the right to refuse to grant any license to the plaintiff because the plaintiff's milk is not pasteurized within the five mile zone as provided in the Madison City Ordinances, and also for other reasons." (R. 40-41).

"Defendants deny that the health officer of the City of Madison could by any *means other than continual inspection* of the plaintiff's plants and of the *several hundred farms* which deliver to those plants satisfy himself that the plaintiff's milk is being produced, pasteurized and distributed in the manner required by the Ordinances of the City of Madison, and defendants allege that *such continual inspection would create undue expense and inconvenience to the City of Madison.*" (R. 42).

In Count Two of plaintiff's second amended complaint (which involved the 25 mile limitation), it reads:

"Upon information and belief plaintiff alleges that the health department of the City of Madison would refuse upon application to issue the permits, and that said action is arbitrary, discriminatory and unreasonable * * *. (R. 31).

In the appellees' answer, they replied:

"Defendants are informed and verily believe that approximately 800 or more farms, located chiefly in the State of Illinois many miles from Madison, furnish milk to the plants of plaintiff. Because it is impracticable to segregate in any plant, the milk from particular farms delivering to the plant, in order to be assured that standards of milk production, processing and transportation required by the Madison ordinances are maintained, as to any milk delivered from such plant to the City of Madison it would be *necessary* for the city health authorities

regularly to inspect the said plants and 800 or more farms delivering to them, even if the amount of milk from said plants sold in the City of Madison is very small, as defendants are informed and verily believe." (R. 45).

"If plants so operated and located at a distance from Madison are permitted to supply milk to Madison, such operations and the frequent fluctuation in inspection responsibilities of the City in the inspection of said plants and the farms supplying them would unreasonably burden the City of Madison." (R. 46).

"The defendants admit upon information and belief that the plaintiff does not own the farms from which it obtains the milk which it pasteurizes at its plants located at Chemung, Illinois and elsewhere; and that it obtains milk from approximately 900 different farms located in Northern Illinois and Southern Wisconsin and all farms are more than 25 miles from the City of Madison, and that plaintiff does not obtain milk from any farm located within 25 miles from the City of Madison."

"The defendants have no information or knowledge sufficient to form a belief as to whether the plaintiff's business is dependent upon obtaining milk from the milk producers located in Northern Illinois and Southern Wisconsin or whether the plaintiff is able, willing, or ready to have each of said owners of said farms where it obtains said milk make application to the City Health Department of Madison. *Any application by the said farm owners* to the City of Madison to deliver milk in Madison which milk has been pasteurized outside of the five milk pasteurization limit contained in Section 7.21 of the present Madison Ordinances *would be denied.*" (R. 48-49).

"Defendants allege that in view of the great supply of milk available within a radius of 25 miles from

> the Capitol Square of the City of Madison, the provision of the Madison Ordinance that the City need not inspect or issue permits to farms located beyond that radius is entirely reasonable and a proper health regulation and that said provision aids the effectiveness of inspection by the City Health Department and minimizes the cost thereof to the City and its tax payers." (R. 50).

Thus the issues are clearly drawn. They are, whether the five mile limitation and the twenty-five mile limitation were necessary to protect the health of the citizens of Madison. It further appears that Madison denied the application because milk was not pasteurized within the five mile zone, and the trial court found that to be the fact. (Finding 5, R. 53).

It further appears without dispute that the health officers of Madison refused to make any inspection or any investigation as to whether or not the plaintiff's milk complied with the health requirements of the Madison Ordinance, and further that they proposed not to do so.

It further appears that the plaintiff offered to have each of the 950 farms make an application for a permit, but the appellees' answer stated that even if the applications were made, that they would be denied.

It therefore follows that the statement in appellees' brief:

> "There is nothing in the record indicating what action the Madison Health Department would take on any applications for permits by Dean's Illinois producers if the milk were to be pasteurized within five miles of the Capitol Square in Madison, or if the five mile pasteurization should finally be held invalid,"

is contradicted by the record.

It further appears that appellees' constant repetition that it is is appellant's position, that the appellant would deprive a community of all right of inspection over its milk supplies is likewise not supported by the record.

The health officers of Madison have at all times been perfectly welcome to inspect every farm that sends milk to the Dean plants, to inspect the plants and make any other inspection that they deem necessary. The appellant makes no such contention, that the health officers of Madison may not inspect Dean's farms and plants. It is the appellant's position that its products meet the requirements of the Madison ordinance. Madison refuses to inspect the farms and plants, and to find out, saying it would create too heavy a burden. Then the appellant brought forth these other methods, which do not involve any financial burden.

One method is the reciprocal method set forth in Sec. 11 of the Model Milk Ordinance; another method is for the health officer to make spot checks of his own, just as the health officer from Janesville did, which is set forth on page 91 of the Record; another method would be to make inquiries among the health officers in the 200 cities in which Dean Milk Company sells milk. For example, the City of Kenosha has checked something like 500 farms and issued a permit on August 1st, 1949. (R. 82).

The health officer of Madison could also inquire at the Department of Agriculture of Wisconsin. That department picks up samples of milk and checks them. A number of checks are set forth in the record, and each check or test showed that Dean's Milk exceeded the requirements of the Madison Ordinance in both the butter fat content and the bacteria count. Madison allows a bac-

teria count of 30,000, and the test showed a bacteria count in Dean Milk of around 7000. (R. 83).

It is not the appellant's contention that this Court should declare that the minimum standards of the United States Model Milk Ordinance and Code shall be the maximum standards of any city or village milk ordinance in the country.

The question is, does Dean's milk comply with the health requirements of the Madison Ordinance? The record shows that it met the health requirements and exceeded the milk that was being sold and had been sold in Madison for years.

Appellees contend that the Madison Ordinance is an upward revision. Appellees point to the provision providing for cooling of the milk to 60 degrees after milking. The revised Model Milk Ordinance contains exactly the same provision, (R. 194) and that said provision was in full force and effect at the time of the trial. (R. 158). Dr. Kincaid, the chief health officer, admitted that the Model Milk Ordinance contained the same provision as the Madison Ordinance. (R. 73).

Further, it was shown at the trial that the purpose of cooling the milk was to keep the bacteria count, before pasteurizing, to 200,000 per c.c. Although the Chicago ordinance achieved the same thing by a slightly different method, it met the same requirement as to bacteria count, and for scientific purposes complied with the requirements of the Madison Ordinance. (R. 79). The same thing was testified to by appellees' witness Friday. (R. 124-125).

The trial court made *no* finding that the five mile limitation or the twenty-five mile limitation was a necessary health measure.

There was no proof that either of these limitations were health measures.

On the contrary, appellant produced testimony that such limitations are not necessary health measures.

Dr. W. J. Corbett testified that the five mile and twenty-five mile limitations were not necessary health measures. (R. 88).

H. J. Burger, Milk Sanitarian for Janesville, Wisconsin, a disinterested witness in this case, gave like testimony. (R. 89).

Dr. Fred B. Welch, health officer of Janesville, and a disinterested witness, testified in regard to such limitations:

> "I don't think such a limitation has any value at all in the protection of public health of the city as far as the milk supply is concerned." (R. 93).

Contrary to the impression that the appellees seek to leave, that the appellant would deny the health officers of Madison the right to inspect its farms and plants, the fact is that all of its records are kept available for inspectors, and its plant and farms are checked and inspected by many of the municipalities other than Chicago.

Dr. W. J. Corbett testified as to the tests that were made and kept on record. That part of his testimony begins near the bottom of page 82 of the Record, and on page 87 he testified:

> "Dean Milk Company has no objection to the City of Madison inspecting all of these farms, delivery trucks, pasteurization plants, and have no objection to anyone inspecting and our records are available and open to any municipality of the state." (R. 87).

James H. Davis testified of the tests and records of the farms that were made and kept of record. The testimony begins on page 97. At page 100 he testified:

> "One copy is usually left with the farmer and another copy filed with the plant. These records are available to any health officer who wants to inspect them. These records take up the health of the cows and follow the health code."

II.

The Five Mile and the Twenty-Five Mile Limitations Are Trade Barriers.

Appellees contend that the five mile limitation does not violate the Interstate Commerce Clause because they say that appellant is at liberty to locate a pasteurization plant within five miles of Madison. The difficulty with that contention and solution is that it is not economically possible to build a million dollar milk plant in every city and village. And further, appellant would not be allowed to use the plant unless it obtained its milk within the twenty-five mile radius.

The twenty-five mile limitation prohibits even the storage of milk obtained from a farm without a permit, and according to the defendants' answer, permits would not be issued to any farm located more than twenty-five miles from Madison.

The opinion of the Supreme Court of Wisconsin, which appellees are now defending, states:

> "The plaintiff contends that its inspection, with that of the Chicago Board of Health and spot checks by the United States Public Health Service, result in a product that is clean, pure and wholesome, and

> that it should be permitted to flow freely to market unburdened by duplication of inspection and that the restrictions in the Madison milk ordinance are prohibitive trade barriers and therefore unconstitutional under the Fourteenth Amendment and the Interstate Commerce Clause of the United States constitution. *The courts of some states have so held.*" (Italics ours.) (R. 292-293.)

The proof showed that those limitations are not health measures. They do have the effect of prohibiting interstate commerce. This Court said in the case of *Brimner* v. *Rebman,* 138 U.S. 78, 34 L.E. 862:

> "Any local regulation which, in terms or by its necessary operation, denies this equality in the markets of a state, is, when applied to the people and products or industries of other states, a direct burden upon commerce among the states, and therefore void."

Appellees make the contention that milk should be treated differently from other foods. The Courts, however, have not agreed with the appellees. In the case of *City of Greenville* v. *Cabells, Inc.,* (Tex.) 207 S.W. 2nd, 898, the Court states:

> "Milk and other dairy products are legitimate subjects of commerce, and the right to sell them should not be abridged by legislative bodies further than reasonable to protect and safeguard the public health."

Appellees ask the Court to take judicial knowledge that the meat business is national in scope and that the milk business is so local in nature that Congress could not set up an inspection service similar to meat. The proposition is untenable because it does not square with the facts. There are meat packing plants all over the country. They are not all located in Chicago and Kan-

sas City. On the other hand, fresh milk is shipped all over the country. In *Miller* v. *Williams,* 12 Fed. Supp. 236, which involved the City of Baltimore, the Health Officer complained that it was impossible to make frequent inspections of dairy plants in Wisconsin, but yet the Court struck down the 50 mile limitation. Dr. Fauerback, a witness for the appellees, testified:

> "Q. So that you heard the testimony, did you not, of Birmingham, Alabama, and those Southern cities obtaining milk up here?"
>
> "A. Yes, I did." (R. 137).

Dr. Fauerback further testified that the Southern cities were doing their duty legally in protecting the health of their citizens by trusting the inspection at the source of the milk (R. 138), forgetting, perhaps for the moment, his thesis about the personality element in inspection which appellees stress at great length in their brief.

Appellees ignore the fact that the State of Wisconsin by General Order 125 entitled:

> "Standards and Regulations for the Production and Processing of Milk and Milk Products for Interstate Shipment"

has recognized that milk is a subject of interstate commerce.

This Court stated in *H. P. Hood & Sons* v. *DuMond,* 336 U. S. 525, 535, 69 S. Ct. 657, 663:

> "The Court held that when a state recognized an article to be a subject of commerce, it cannot prohibit it from being a subject of interstate commerce; that the right to engage in interstate commerce is not the gift of a state, and that a state cannot regulate or restrain it."

Appellees ignore the further fact that Congress in the Agricultural Adjustment Act, Sec. 1, 8c (5) (G) as amended by the Agricultural Marketing Agreement Act of 1937, 7 U.S.C.A. Secs. 601, 608 (c) (5) (G) has recognized milk as a subject of interstate commerce for the purpose of stabilizing prices.

This Court stated in *H. P. Hood & Sons* v. *DuMond*, 336 U.S. 525, 544, 69 S. Ct. 657, 668 in regard to that act:

> "These sections and reports indicate that it is the deliberate policy of the Congress to prevent federal officers from placing barriers in the way of the interstate flow of milk."

It is not necessary to cite cases that milk is subject to contamination is not properly pasteurized and cared for. That is common knowledge. But the same is true of meat. Appellees' witness, Nichols, testified:

> "What I have said about milk being easily contaminated is also true of fresh meat. Fresh meat will be attacked by micro-organisms if it isn't preserved or sterilized." (R. 160).

There is perhaps some difference in degree, but fundamentally, the meat problem and the milk problem are about the same. Notwithstanding appellees' argument, we believe that Congress will be able to find words to convey its meaning in case it decides to extend milk regulation and supplant the work now being done by local inspectors. The Federal Government could appoint the local inspectors in lieu of the present program of grading and evaluating local inspection.

The "upward revisions" were not established. Appellees complain about our statement that Madison has been forced to drink ungraded milk for years and states:

> "The record contains no comparison of the quality of appellant's milk and of that sold in Madison."

Here is what Luchterhand, Chief Sanitarian for the State Board of Health, and appellees' witness, testified:

> "Milk sold in Madison today could not be labelled as Grade A under the United States Model Code, but it is my understanding that the local health department is bringing their producing farms and plants up so that they can obtain a Grade A label." (R. 158).

Dr. Kincaid, Madison Chief Health Officer, testified that of the farms supplying Madison:

> "We hope to have 90% complying within a year or so as to make it a Grade A shed. You never obtain 100% compliance in any milk shed." (R. 61).

Dean's Milk is Grade A. (R. 78, 195-196). Hence the record does contain a comparison and shows that Dean's milk excelled any that was being sold in Madison at the date of trial.

The trial court was of the opinion that it was immaterial whether the standards under which Dean's milk was produced were higher or lower than Madison's (R. 7).

Appellees profess difficulty with the word "wholesome." The Courts have encountered no such difficulty. The trial court stated, quoting in part from *Dyer* v. *Beloit*, 250 Wis. 613:

> "It can not be said that the city, in adopting the section in dispute (6 mile limitation on pasturization plants) arbitrarily acted on the question of convenience, efficiency, and cost of inspection, unless we adopt the rule in the case of *Meridian Ltd.* v. *Sippy*, 54 Cal. App. (2d) 214, 128 Pac. (2d), 884, where the

Court said that milk production is a legitimate business and so long as persons engaged in the business put out a clean, pure and wholesome product it should be permitted to flow freely on the markets, unburdened by duplication of inspection and prohibitive trade barriers, *which rule we do not adopt.*"

"It should be noted that the Supreme Court of Wisconsin, in the foregoing, *refuses* to adopt the rule laid down by the same court or courts, namely, that if the milk is 'a clean, pure and *wholesome* product', therefore it should be permitted to flow freely on the markets, 'unburdened by duplication of inspection and prohibitive trade barriers',—which is Dean's argument in almost its exact words, *infra.*"

This Court stated in *Baldwin* v. *Seelig*, 294 U.S. 511, 521, 55 S.Ct. 497, 499, 78 L.Ed. 1032:

"New York is equally without power to prohibit the introduction within her territory of milk of *wholesome* quality acquired in Vermont, whether at high prices or low ones * * *."

The meaning is clear. It is the position of the Wisconsin Court that artificial barriers may be erected regardless of what standards the outside milk may be capable of meeting.

Appellant's milk meets all the health standards in the present Madison Ordinance. (R. 82, 98). Milk being sold in Madison at the time of the trial did not. Appellees take the position that they can shut their eyes and ears and rest smugly behind the five mile and the twenty-five mile limitations. Their answer states that they have taken no steps to ascertain if appellant's milk meets the health requirements of the Madison Ordinance and that *they do not propose to do so.*

We submit their action is arbitrary and in violation of due process.

Counsel cites the case of *Dean Milk Company* v. *City of Chicago*, 385 Ill. 565, 53 N.E. (2d) 612, holding reasonable an ordinance banning paper bottles apparently for the purpose of showing that an arbitrary ordinance may be upheld by the Courts. Counsel apparently did not know the history of this matter. There was confusion as to the meaning of the ordinance, and whether Chicago had statutory power to enact it. This same ordinance was held unconstitutional in the case of *Fieldcrest Dairies* v. *City of Chicago*, 35 F. Supp. 451, (N.D.Ill.) and in the Seventh Circuit Court of Appeals, 122 F. (2d) 132. This court granted certiorari and in 316 U.S. 168, 62 S. Ct. 986, 86 L.Ed. 1355, held that the Federal Courts should defer their rulings until the Illinois State Courts had settled the meaning of the ordinance and Chicago's statutory powers to enact it. When the Illinois Supreme Court ruled, Chicago then amended its ordinance and permitted paper bottles. The Circuit Court of Appeal stated at page 139:

> "It is true the record discloses some evidence in support of defendants' contention that the use of such containers presents a hazard to health. *Such evidence, however, carries little, if any, conviction when considered in connection with the fact that the United States Public Health Service, whose model ordinance has been widely adopted by cities throughout the United States, including the City of Chicago, amended its ordinance in* 1939, *so as to include the regulation of single service containers, and that such amendment was subsequently proposed to the Council of the City of Chicago by its Board of Health;* that the Legislature of the State of Illinois and its Department of Health have approved the use of such containers since 1939, and that their use has been authorized and permitted by more than 200 cities and villages in the United States, including such

cities as Washington, D.C., New York and Philadelphia, as well as practically all of the cities and villages near and adjacent to the City of Chicago."

The situation is comparable to the case of *Dyer* v. *Beloit*, 250 Wis. 613. In that case, Beloit made the same claims that are now advanced by the appellees in the case at bar, i.e., the six mile limitation on pasteurization plants were a necessary health measure; that it would be burdensome to inspect Dean's plant and farms and that if Beloit was forced to inspect Dean's, then every milk dealer in the country could demand equal treatment, etc. This Court noted probable jurisdiction October 13, 1947, 68 S.Ct. 87. Thereafter, appellees filed affidavits confessing that they were wrong, and stating that a license had been issued to Dyer. Those affidavits are in the files of this Court in the case of *Dyer, Appellant* v. *City Council of Beloit, et al., Appellees*, No. 275, October Term, 1947.

Appellees stress the necessity of constant and close supervision over farms. Let us see how close and constant that supervision really is. For years the Madison milk shed has not measured up to a Grade A rating, and was unable to qualify as such at the time of the trial. The present Madison Ordinance provides for inspection of farms "at least every six (6) months", and dairy plants and receiving stations "at least monthly." (R. 244).

Inspecting a dairy farm every six months is not very "close and constant supervision."

On the other hand, Dean's farms are inspected every thirty days by Dean's inspectors. (R. 97). They are inspected by the Chicago Board of Health. (R. 80).

"Cities other than Chicago inspect Dean plants and run spot checks on the farms. The City of Kenosha, Wisconsin, recently checked a large number of farms, something like 500, and the City of Kenosha issued a permit to Dean Milk Company on August 1, 1949." (R. 82).

Then the United States Public Health Service evaluates the inspection service of the whole milk shed.

We will leave it to this Court to decide which set of farms is receiving "close and constant supervision."

Competition improves the quality of milk. This record is ample proof of that fact.

III.

Appellant Seeks to Have the Judgment of the Supreme Court of Wisconsin Reversed.

Under argument, appellees state in effect that appellant is seeking to have this Court deprive local governments of the power to establish health standards and to force them to accept as maximum standards the minimum standards suggested by the United States Public Health Service.

We are content to let our brief speak for itself. It does not and we do not ask this Court to assume the power of legislation. We have not asked this Court to rule on hypothetical cases, i.e., what the rule should be if other milk dealers beyond the 25 mile orbit sought admission. Appellees have sought to interject such matters in this case. The question before this Court is whether a local government can arbitrarily prohibit interstate commerce in milk by drawing arbitrary lines around it-

self. These lines are arbitrary because they are not health measures. They hurt the health situation instead of helping it. The statement that Madison does not have personnel enough in the Health Department to inspect appellant's farms and plants does not justify the arbitrarily geographical restrictions. Dr. Kincaid, Madison's Chief Health Officer, testified that its personnel would be insufficient to inspect Dean's farms and plants if they were located within the respective five mile and twenty-five mile limitation. (R. 68-69). Madison's refusal to inspect or to use other recognized and approved means to ascertain that Dean's milk complies with the Madison Ordinance is arbitrary. Having proved that Dean's milk complies with all health standards of the Madison Ordinance, we submit that appellant is entitled to a milk license and to have the judgment of the Wisconsin Supreme Court reversed.

This action was brought under the Declaratory Judgment Act. (See page 81 of our principal brief.) Under that Act, the Court confines itself to appellant's rights. The function of laying down rules and regulations for future cases lies in the field of legislation. The sole question here is whether or not Dean can sell milk in Madison in interstate commerce when the milk complies with all the health requirements of the Madison Ordinance or whether appellant can be barred by these arbitrary and unnecessary barriers.

IV.

Conclusion.

We submit that the judgment of the Supreme Court of Wisconsin should be reversed with directions to declare the two limitations null and void and to grant the prayer of the appellant's complaint.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 258

DEAN MILK COMPANY, A CORPORATION,
Appellant,

vs.

CITY OF MADISON, WISCONSIN, A MUNICIPAL CORPORATION, DR. C. K. KINCAID, AS HEALTH COMMISSIONER FOR THE CITY OF MADISON, WISCONSIN, LEONARD HOWELL, AS CITY MANAGER OF THE CITY OF MADISON, WISCONSIN, AND THE COMMON COUNCIL OF THE CITY OF MADISON, WISCONSIN,
Appellees

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

WALTER P. ELA,
Attorney for Appellees,
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INDEX

Subject Index

	Page
I. Nature of Case	1
II. Question Involved Is Unsubstantial	9
III. Discussion of Authorities Cited in Appellant's Statement	18

Table of Cases Cited

City of Wenoka v. *Rose Lawn Dairy* (Okla.), 212 P. (2d) 1056	20
Dean Milk Co. v. *City of Madison*, 43 N. W. (2) 480	10
Dean Milk Co. v. *City of Waukegan*, 403 Ill. 597, 87 N. E. (2) 751	20
Dean Milk Co. v. *City of Chicago*, 385 Ill. 565, 53 N. E. (2d) 612	15
Dyer v. *City Council of Beloit*, 250 Wis. 613, 27 N. W. 850	12, 15
Hauge v. *City of Chicago*, 299 U. S. 241, 57 S. Ct. 241	16
Higgins v. *City of Galesburg (Ill.)*, 401 Ill. 87, 81 N. E. (2d) 520	20
H. P. Hood & Sons v. *DuMond*, 336 U. S. 525	19
Koy v. *City of Chicago*, 263 Ill. 122, 104 N. E. 1104	13
LaFranchi v. *City of Santa Rosa*, 8 Cal. (2d) 331, 65 Pac. (2d) 301	20
Meridian v. *Sippy* 54 Cal. App. (2d) 214, 128 Pac. (2d) 884	20
Milk Control Board of Pennsylvania v. *Eisenberg Farm Products*, 306 U. S. 346, 59 S. Ct. 528	16
Moultrie Milk Shed, Inc. v. *City of Cairo* (Ga.), 57 S. E. (2d) 199	20
Nebbia v. *New York*, 291 U. S. 502, 54 S. Ct. 505	15
Pfeffer v. *Milwaukee*, 171 Wis. 514, 177 N. W. 850	13
Prescott v. *City of Borger* (Tex. App.), 158 S. W. (2d) 578	20

Page

Sheffield Farm Co., Inc. v. *Seamen* (N. J.) 114 N.J.L. 455, 177 A. 372 19

State ex rel. Larson v. City of Minneapolis, 190 Minn. 138, 251 N.W. 121 19

STATUTES CITED

Section 7.11 City of Madison Ordinance 3, 9

Section 7.21 City of Madison Ordinance 3, 4, 9, 16, 17, 18

Section 7.15 (2) and 7.16, City of Madison Ordinance 4

Section 7.15 (1) (b), (2) to (24) 4

Section 7.09 (21) 4

Model Ordinance U. S. Public Health Service 5

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Appellees

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

The Appellees in the above-entitled cause for their joint statement in opposition to Appellant's statement as to jurisdiction herein, and in support of appellees' motion to dismiss or affirm, respectfully show the following:

I. Nature of Case.

The Madison, Wisconsin, milk ordinance, which is under attack by the appellant in this case, regulates the distribution and sale of whole milk for direct human consumption in the City of Madison (R. p. 264). It does not regulate

the production of milk produced on farms for use outside the City of Madison. Madison is the center of Dane County which produced in 1948 over 600,000,000 pounds of milk. This is more than ten times the milk used in the City of Madison. Large quantities of milk are shipped to the Chicago market and large quantities are made into cheese, butter, evaporated milk, etc. The area within a radius of 25 miles from the capitol square in the City of Madison includes practically all of Dane County and portions of adjoining counties. At present Madison's pasteurized milk is furnished entirely from farms located within about 18 miles of the capitol square. (R. p. 3). At the time of the trial about 500 farms in Dane County were delivering milk to the Madison market. Sixty per cent of those farms were within ten miles of the City of Madison, none were further than twenty miles (R. p. 118). A tremendous amount of milk produced on farms in Dane County is shipped to Chicago for fluid milk distribution. Inspectors from the Chicago Board of Health make inspection of farms in Dane County producing milk for the Chicago market. (R. p. 119). The Wisconsin Department of Agriculture leaves to Wisconsin cities the responsibility of protecting the purity of fluid milk but assumes the responsibility for the enforcement of regulatory provisions pertaining to Grade "B" milk (for manufacturing purposes). At the time of the trial there was roughly 4,000,000 pounds of fluid milk and cream consumed in Madison in a month (R. p. 118). In 1945 the following amounts of dairy products were produced in Dane County:

Butter	4,447,000 pounds
Cheese	12,683,000 pounds
Evaporated and Condensed Milk	55,497,000 pounds
Powdered skim milk	7,142,000 pounds
Ice Cream	444,000 pounds

(R. p. 117). The city, therefore, exercises regulatory control over less than a tenth of the milk produced in Dane County. The State or Inspectors of the Chicago Board of Health, making inspections under the Chicago milk ordinance exercise regulatory control over the balance (R. p. 119). Approximately 9/10ths of the milk produced in the area which furnishes milk to the Madison market is, therefore, not subject to the Madison milk ordinance. The Madison ordinance provides health precautions and sanitary regulations, as well as inspection of the pasteurization plants, and also for periodical inspection of all farms supplying such plants (R. p. 237). No attack is made upon any provisions of the ordinance except sections 7.11 and 7.21. 7.11 provides:

> "It shall be unlawful for any person to bring into or receive into the City of Madison, Wisconsin, or its police jurisdiction, for sale, or to sell, or offer for sale therein, or to have in storage where milk or milk products are sold or served, any milk or milk products as defined in this ordinance from a source not possessing a permit from the Health Commissioner of the City of Madison, Wisconsin.
>
> "Only a person who complies with the requirements of this ordinance shall be entitled to receive and retain such a permit.
>
> "On filing of an application for a permit with the Health Commission, he shall cause the source of supply named therein to be inspected and shall cause all other necessary inspections and investigations to be made. The Health Department shall not be obligated to inspect and issue permits to farms located beyond twenty-five (25) miles from the central portion of the City of Madison otherwise known as the Capitol Square. If the source of supply named therein conforms to the standards of this ordinance a permit may be issued by the Department of Public Health and

shall remain in effect unless revoked in accordance with the provisions of this or other ordinances of the City of Madison, or until there is a change in ownership or tenancy of the premises. . . ."

Section 7.21 of the Madison milk ordinance provides:

"Pasteurization Plants to Be Within Five Mile Radius. It shall be unlawful for any person, association or corporation to sell, offer for sale or have in his or its possession with intent to sell or deliver in the City of Madison, any milk, cream or milk products as pasteurized unless the same shall have been pasteurized and bottled in the manner herein provided within a radius of five miles from the central portion of the City of Madison otherwise known as the Capitol Square, at a plant housing the machinery, equipment and facilities, all of which shall have been approved by the Department of Public Health."

The Madison milk ordinance (R. p. 237) contains detailed provisions regulating the construction of farm buildings and laying down standards for milking and cooling procedure and for farm sanitation (sections 7.15 (2) and 7.16). The ordinance similarly has detailed regulations for milk processing and distribution (sections 7.19, 7.20 and 7.21). The Madison ordinance defines Grade "A" pasteurized milk as "milk produced in accordance with section 7.15 (1) (b), (2) to (24), inclusive, and which has been pasteurized, cooled and bottled in a milk plant conforming with all of the following items of sanitation and the average bacterial plate count of which, at no time after pasteurization until delivery, shall exceed thirty thousand (30,000) milliliter as determined under section 7.09 (21) and section 7.14. The coliform count shall not exceed five (5) milliliters as determined under section 7.14. The allowable bacteria count as stated above for grade "A" pasteurized milk shall be applied to all milk or milk products as defined in this ordinance. The allowable bacteria count

of thirty thousand (30,000) per milliliter shall not apply to buttermilk, cottage cheese and sour cream. The inspection of milk plants shall also include receiving stations, and shall conform with the following items. . . ."

The Dean Milk Company is a Chicago corporation which operates several plants in Illinois. It operates two pasteurizing plants located at Chemung and Huntley, Illinois. (R. p. 78). The Dean Milk Company obtains its milk from approximately 950 farms in northern Illinois and southern Wisconsin (R. p. 80). Chemung, Illinois is about sixty-five miles southeast of Madison and Huntley is about eighty-five miles from Madison (R. p. 84). The farms that furnish these plants with milk are located in an area about 20 to 25 miles around the plants (R. p. 84). The farms which produce milk for the Dean Milk Company are inspected by inspectors of the Chicago Board of Health acting under the Chicago milk ordinance (R. p. 75). Under the Chicago milk ordinance all farms producing milk for the Chicago market are inspected by inspectors from the Chicago Board of Health (R. pp. 91, 119). The Madison milk ordinance is not similar in all respects to the Chicago milk ordinance. In many respects the Madison milk ordinance contains higher standards (R. pp. 130-134).

Both the Madison and the Chicago milk ordinance contain many of the provisions of the United States Public Health Service model ordinance but neither of them contain all of the provisions. The United States Public Health Service model ordinance is not a law or ordinance at all in the sense of it being adopted by the United States. It is merely a model ordinance prepared by personnel in the United States Public Health Service as an aid to municipalities in formulating their own milk ordinance (R. p. 146). The United States Public Health Service do not insist that any municipality adopt the model ordinance as worded. Changes in the model ordinance by different municipalities

to fit their purpose are recognized and expected and municipalities will be given credit for up-grading. (R. p. 146). Section 11 of the model ordinance (R. p. 191) providing for reciprocal inspection, provides as follows:

> "*Milk and milk products from points beyond the limits of routine inspection.*—Milk and milk products from points beyond the limits of routine inspection of the city of —— may not be sold in the city of ——, or its police jurisdiction, unless produced and/or pasteurized under provisions equivalent to the requirements of this ordinance: Provided, That the health officer shall satisfy himself that the health officer having jurisdiction over the production and processing is properly enforcing such provisions."

(R. p. 191). The City of Madison refused to adopt this provision of the model milk ordinance and in lieu thereof adopted section 7.21 (R. p. 66).

Upon the trial evidence was introduced to show that in order to safeguard the supply of milk for human consumption it was necessary to provide for minute regulations of the cattle from which milk is produced, the barns and surroundings where the cattle are kept and the means whereby the milk is transported from farm to market; also, that it is necessary to make minute inspections of the plants where the milk is processed and pasteurized; also, that merely taking bacteria counts of the finished product is not sufficient to protect the public (R. pp. 119, 135, 149, 159).

Both the United States Public Health Service model ordinance and the Chicago milk ordinance contain minute provisions for inspection of dairy cattle, dairy barns and milk processing plants (R. p. 161).

Under the reciprocal inspection provision of the model milk ordinance (Section 11) the recommendation of the United States Public Health Service and the practice of cities adopting such ordinance is to rely upon the grading

system of the United States Public Health Service (R. pp. 89, 96, 108, 191). This grading system of the United States Public Health Service is a system whereby an entire milk shed is sampled by a "spot check" procedure both at the farm and at the plant and the results are weighed and graded by state government personnel in accordance with practices recommended by United States Public Health Service to give a "grade" for the whole milk shed (R. pp. 144-146). Mr. Luchterhand, from the Wisconsin State Department of Public Health, testified that this rating system is to help evaluate local enforcement, that it is used by some communities in determining whether to accept milk from another milk shed and that a high rating does not necessarily mean that all milk sold on the milk shed is safe. He testified that on the Chicago milk shed with 10,000 or more farms, the rating was based on inspection of 200 farms and the same representation of the total number of pasteurization plants (R. p. 145). He stated that the fact that the Chicago milk shed was graded over 90% (a satisfactory grade under United States Public Health procedure) in the last grading (made in 1947) did not necessarily mean that any of the farms supplying the Dean plants, or any of the Dean plants, were actually inspected and included in the grading (R. p. 157). He testified that there is nothing in the United States Public Health code and particularly in Section 11 thereof, that would require a city to rely on the grading system in determining whether to accept milk; that the United States Public Health Service does not object to a city introducing higher requirements than those contained in the United States Public Health code and that reliance by a city on the grading process is entirely voluntary with the city. (R. p. 157).

The Madison Health Department milk inspection staff consists of one full time dairy sanitarian and an additional sanitarian who spends most of his time in this work. They

inspect some 500 farms supplying the Madison market and the dairy plants. Their salaries are $280 and $300 per month. If 950 more farms were to be inspected and were all located within a 25 mile limit, it would require approximately two additional full-time sanitarians. If these additional farms were located where the plaintiff's farms are located, there would be required an additional three, or more, sanitarians working full time (R. p. 129). It would mean added expense to the city for additional salaries, mileage and living expenses of the inspectors working in Illinois and southern Wisconsin. The city would also need additional laboratory facilities located near the farms or facilities would have to be provided for getting milk samples from the Illinois farms back to Madison for making laboratory tests in Madison. This would involve additional expense.

The Dean Milk Company does not transport milk to or sell milk in the City of Madison or Dane County, nor does it propose to. It sells bottled, pasteurized milk to Robert Adler at Chemung, Illinois. Robert Adler transports the milk in his own refrigerated truck and sells it to stores in Wisconsin, including various communities in Dane County (R. p. 103).

There are three dairies located within the five mile radius pasteurizing and delivering milk in the City of Madison, the Borden Company, the Bowman Farm Dairy and the Bancroft Dairy, also the Madison Milk Producers Association, which is an association of farmers whose chief objective is to supply the City of Madison with fluid milk, maintains a surplus plant which processes Swiss cheese. (R. p. 118). This association has more than 350 members.

After the denial of a license solely because the pasteurization plant from which the appellant was to bring milk for direct consumption in the City of Madison was outside the prescribed limits of section 7.21, appellant brought

an action for declaratory judgment in the Circuit Court for Dane County for the purpose of determining the validity of both section 7.11 and section 7.21 of the Madison milk ordinance. The Circuit Court upheld the validity of section 7.21 and dismissed the action as to section 7.11 for lack of a justiciable dispute. Upon appeal the Supreme Court of Wisconsin on June 30, 1950, entered judgment affirming the decision of the lower court. It is conceded that the federal questions now raised in this case were raised and urged throughout all the proceedings in the state court.

II. Question Involved Is Unsubstantial.

It is denied that the Supreme Court of Wisconsin held in this case that a municipality might arbitrarily restrict and limit the production and sale of any wholesome food to such surrounding territory as the municipality deemed capable of producing and processing the necessary amount to supply its population.

The trial court in its opinion expressly repudiated any such doctrine in the following language:

> "Madison's five mile pasteurization ordinance is a valid regulation under the 'police power' to protect the public health and welfare. It simplifies inspection of plants by requiring them to be near at hand, thus permitting more intense and constant inspecting than if such establishments were located anywhere in the United States.
>
> "A city like Madison, in the interests of public health, is entitled to set up its own system of milk inspection if it be a reasonable one. The City is not forced to rely upon inspection by some other governmental unit nor to submit to 'reciprocal inspection' unless some higher authority properly decrees it.
>
> "One municipality does not have to sacrifice its standards to those of another community which may

be lower nor is one governmental unit necessarily compelled to yield its independence to another, even though the latter's gauges of inspection purport to be equal or slightly higher.

"The City of Madison—in the public concern over health—has an autonomy, a measure of local self-government, which, if exercised reasonably, need give way only to a constitutional enactment by the legislature of Wisconsin or the Congress of the United States, if such exists. None such does exist as yet. * * *"

The following excerpts from the opinion of the Supreme Court of Wisconsin in this case, *Dean Milk Co.* v. *City of Madison*, 43 N. W. (2) 480 at page 483, repudiate any implication that the Court held that the city may impose trade barriers upon the production and processing of milk:

"We agree with the trial court. The five-mile limitation as to pasteurization plants is reasonable as applied to this plaintiff. It has no pasteurization plant within any reasonable distance of Madison. This provision of the ordinance was not adopted to exclude plaintiff, nor does it discriminate against it.

"As to plaintiff's contention that the twenty-five mile limitation is likewise unconstitutional, we affirm the trial court in holding that there is no justiciable controversy between the parties on that question. Dean Milk Company is not a farmer and, so far as the record shows, owns no farm. No farmer producing milk is a party to this action, and plaintiff is not entitled to ask for a judgment declaring the rights of persons who are not parties to the action."

The facts in this case equally repudiate the assertion in petitioner's brief that the intent or effect of the ordinance is to create a trade barrier. The City of Madison is in the center of a large milk producing area. It produces ten times as much milk as the inhabitants consume. The ordinance requiring pasteurization plants to be located

within a five mile radius of the City of Madison is a reasonable health measure because it simplifies the inspection of plants by requiring them to be near at hand, thus permitting more intense and constant inspection than if such establishments were located anywhere in the United States and minimizes the expense of inspection (R., p. 53). The natural result of plants being located close to the city is that farms delivering milk to such pasteurization plants will also be located within a close radius governed by transportation economics so that inspection by city health authorities of not only the pasteurization plants but also of the farms which supply those plants is made convenient and efficient and the cost of such inspection to the city and its taxpayers is kept within reasonable bounds (R., p. 122).

It cannot be soundly argued that the Madison ordinance creates a trade barrier merely because the appellant refuses to comply with it. There is nothing to prevent him pasteurizing his milk within the five-mile radius as other producers are required to do. If he is permitted to deliver milk into the City of Madison not produced in compliance with the City of Madison ordinance, a distance of 65 to 85 miles, then others will have the right to haul from greater distances and from different directions—and incidentally, from localities where there may be no local inspection at all. Under these conditions there would no doubt be a partial, if not a total, breakdown in the inspection service of the city. The selfish business interests of a lone operator are not to be compared to the health of an entire community. The City of Madison cannot be required to rely upon the spot checks of the United States Public Health Service made once in two years to safeguard the milk supply of its inhabitants, especially where the evidence shows that these spot checks may not even cover the farms or producing plants of the dairy which wishes to introduce its milk with-

out compliance with the provisions of the Madison ordinance.

The basic law was fully set forth by the Supreme Court of Wisconsin in *Dean Milk Company* v. *City of Madison* in reiterating the language it used in *Dyer* v. *City Council of Beloit*, 250 Wis. 613, 27 N. W. (2d) 733, as follows:

> "That cities have a right to pass a milk ordinance for the welfare and health of their citizens is not disputed, and milk ordinances are general in the state of Wisconsin and elsewhere in the nation. Such an ordinance must be reasonable and not arbitrary, must not go beyond the reasonable demands of the occasion, and must tend to accomplish the purpose of its adoption. Courts will not interfere with the exercise of police power by a municipal corporation in the absence of a clear abuse of discretion and unless it is manifestly unreasonable and oppressive, for it is not within the province of the courts, except in clear cases, to interfere with the exercise of this power reposed by law in municipal corporations. 11 Am. Jur. Constitutional Law, p. 1092, sec. 307. Municipal corporations are *prima facie* the sole judges respecting the necessity and reasonableness of ordinances under their police power, and every intendment is to be made in favor of the lawfulness and reasonableness of such ordinance. The city is presumed to have full knowledge of local conditions, and its adoption of an ordinance in the light of this knowledge creates a *prima facie* presumption that it is reasonable. 3 McQuillin, Mun. Corp. (2d ed.) p. 110, sec. 951. The reasonableness of an ordinance depends upon the purposes sought to be accomplished and the effect upon all who must comply with it."

That milk is a product which requires meticulous inspection and supervision all the way from cow to consumer, and which demands the most stringent and detailed regulatory legislation to preserve the public health has long

been recognized by all courts. And municipalities have been recognized as having the widest latitude in the enactment of regulatory milk ordinances even though they impose drastic restrictions on private business. Innumerable cases to this effect could be cited; we limit ourselves to two quotations. In *Pfeffer* v. *Milwaukee*, 171 Wis. 514 at 517, 177 N. W. 850, this court stated:

> "Public health demands that milk and all milk products should be pure and wholesome. It is also common knowledge that milk containing deleterious organisms is an unsuitable article of food. Milk is known to be a product easily infected with germ life and to require special attention and treatment in its production and distribution for consumption as an article of food.
>
> "Under these circumstances and conditions of the milk business it was proper for the common council of the city of Milwaukee to determine in its legislative function what means and methods were best adapted to accomplish the object of supplying the people of the city of Milwaukee with wholesome milk."

The Illinois Court has stated the proposition in somewhat more detail in *Koy* v. *City of Chicago*, 263 Ill. 122; 104 N. E. 1104, 1107:

> "There is no article of food in more general use than milk; none whose impurity or unwholesomeness may more quickly, more widely, and more seriously affect the health of those who use it. The regulation of its sale is an imperative duty which has been universally recognized. This regulation in minute detail is essential, and extends from the health and keeping of the cows which produce the milk, through all the processes of transportation, preservation, and delivery to the consumer. Not only may laws and ordinances require that milk offered for sale shall be pure, wholesome, and free from the bacilli of any disease, but they may and do, in order to produce these results, prescribe the manner in which such purity, wholesome

ness, and freedom from disease shall be secured and made to appear. The cows may be required to be registered with a designated public authority; the dairies to be conducted and managed according to prescribed regulations, and together with the dairy utensils, subjected to inspection; the receptacles in which milk is contained to be of prescribed character and capacity; the labels to be placed according to fixed regulations, and to contain certain required information; the milk to be prepared in the manner, at the times, and by the means directed, and at all times to be subject to inspection. These may be drastic restrictions upon a private business; but experience and the increasing knowledge of the causes of disease and the agencies of its propagation have demonstrated the necessity of such restrictions to the preservation of the public health."

All courts have recognized that they will not disturb municipal ordinances in the absence of a showing of palpable unreasonableness or where there is room for difference of opinion. This court has long recognized this doctrine. Even state and local economic policies and enactments under due process attack will not be nullified unless they are palpably unreasonable or arbitrary. In upholding the New York State Milk Control law, this court stated:

"So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. . . . With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. The course of decision in this court exhibits a firm adherence to these principles. Times without number we have said that the Legislature is primarily the judge of the necessity of such an enactment, that every possible pre-

sumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power."

Nebbia v. *New York*, 291 U. S. 502 at 537, 54 S. Ct. 505, at 516.

The Supreme Court of Wisconsin has said in *Dyer* v. *City Council of Beloit*, 250 Wis. 613, at 616:

> "Courts will not interfere with the exercise of police power by a municipal corporation in the absence of a clear abuse of discretion and unless it is manifestly unreasonable and oppressive, for it is not within the province of the courts, except in clear cases, to interfere with the exercise of this power reposed by law in municipal corporations. . . ."

In *Dean Milk Co.* v. *City of Chicago*, 385 Ill. 565, 53 N. E. (2) 612, the plaintiff which is also plaintiff in this action, contended that a Chicago ordinance permitting delivery of milk only in glass bottles and not in paper containers was unreasonable and hence unconstitutional. The court sustained the ordinance and lucidly set forth the functions of courts in reviewing the reasonableness of municipal ordinances:

> "It is well settled that when a city exercises its power of regulation upon a subject, *courts will not declare the regulatory provisions void unless they are palpably unreasonable and arbitrary*, and that courts are without power to inquire into the wisdom of an ordinance and have nothing to do with the mere policy of legislation (citing cases). *A court will not hold an ordinance void as being unreasonable where there is room for a fair difference of opinion on the question*, even though the correctness of the legislative judgment may be doubtful and the court may regard the ordinance as not the best which might be adopted for the purpose (citing cases). . . ."
>
> 385 Ill. 565 at 578.

In *Hauge* v. *City of Chicago*, 299 U. S. 241, 57 S. Ct. 241, this Court upheld, against a due process attack, a Chicago ordinance requiring that all merchandise sold in load lots by weight must be weighed by a public weighmaster in the City of Chicago even though that required the expense and burden of unloading and reloading each truck after arrival in the city. The requirement of pasteurization of Madison's milk within five miles of the city's center, as contained in section 7.21 of the Madison ordinances, is no more subject to attack than this Chicago ordinance.

It is submitted that section 7.21 of the Madison ordinance is neither unreasonable, nor arbitrary and that it does not violate the Fourteenth Amendment to the Constitution of the United States.

In reference to the claim that section 7.21 of the Madison city ordinance is invalid under the Interstate Commerce Clause, the case of *Milk Control Board of Pennsylvania* v. *Eisenberg Farm Products*, 306 U. S. 346, 59 S. Ct. 528, is in point. That case involved a claim that a Pennsylvania statute requiring licensing and regulating of milk dealers violated the Interstate Commerce Clause. The court said:

> "Every state police statute necessarily will affect interstate commerce in some degree, but such a statute does not run counter to the grant of Congressional power merely because it incidentally or indirectly involves or burdens interstate commerce. This is so even though, should Congress determine to exercise its paramount power, the state law might thereby be restricted in operation or rendered unenforceable. These principles have guided judicial decision for more than a century. Clearly they not only are inevitable corollaries of the constitutional provision, but their unimpaired enforcement is of the highest importance to the continued existence of our dual form of government. The difficulty arises not in their statement or in a ready

assent to their propriety, but in their application in connection with the myriad variations in the methods and incidents of commercial intercourse."

It may well be within the power of Congress to regulate interstate shipments of milk and to set up a detailed system for federal inspection of milk which is to be shipped in interstate commerce. But Congress has not done so. To this date Congress has recognized that the regulation of the production and delivery of milk are local matters. There is no federal regulation. Even the United State Public Health Service only suggests its "model ordinance" to cities; it recognizes that it has no power to compel the acceptance of any part of that form of ordinance by any locality and that it is entirely within the prerogative of any locality to accept or refuse any part of the suggested form of ordinance and to make "upward revisions" from the suggested form.

To adopt plaintiff's argument that all "pure and wholesome" milk must be admitted in interstate commerce free and clear of local right of decision as to what milk it will consider to be "pure and wholesome" and free and clear of all local regulation, would amount to denial of the very theory on which the federal government itself has operated for years in *suggesting* the USPH ordinance, rather than in *ordering* such code as the standard for interstate commerce. To adopt plaintiff's argument would be tantamount to a finding that Congress has adopted some standard — the standard being unstated even by plaintiff—for the interstate shipment of milk. Congress has never adopted any such standard—it has left the field to the exercise of local police powers for the protection of public health.

The pasteurization limit of section 7.21 does not prohibit interstate commerce at all. It imposes no greater restriction on interstate shipments of milk than on intrastate shipments. As the trial court aptly stated: "That requirement

seizes upon the product after it has come to rest in the state. That is not a prohibition of interstate commerce. It is a purely local regulation."

This court has repeatedly recognized the power of states to enact health measures even though they may affect interstate commerce, as distinguished from the burdening of interstate commerce for the state's economic advantage.

> "It (Mr. Justice Cardozo's opinion in *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511) recognized, as do we, broad power in the State to protect its inhabitants against perils to health or safety, fraudulent traders and highway hazards even by use of measures which bear adversely upon interstate commerce." *H. P. Hood & Sons* v. *DuMond*, 336 U. S. 525, 531, 69 S. Ct. 657, 662.

Section 7.21 of the Madison ordinances is clearly a health measure, as it was recognized to be by both the trial court and the Wisconsin Supreme Court. It is submitted that under recognized doctrines of this court it does not in any way violate the Interstate Commerce Clause of the Constitution of the United States.

III. Discussion of Authorities Cited in Appellant's Statement.

Appellant on page 21 of his typewritten statement refers to General Order 125 of the Wisconsin State Department of Agriculture, effective November 15, 1949, entitled "Standards and Regulations for the Production and Processing of Milk and Milk for Interstate Shipment." Aside from the fact that this order appears nowhere in the record and was not introduced on the trial of the case, it should be pointed out that the matter contained in this document is merely part of a sales promotion campaign instituted by the Director of the State Department of Agriculture in order to promote the sale of Wisconsin milk by providing a service to

such out-of-state purchasers as may wish to use it. It merely suggests cooperative effort of Wisconsin producers of milk who may wish to enter the program and contains no sanctions or penalties. It has not the force of law. The State of Wisconsin does not purport to or attempt to make inspections of fluid milk unless requested under the new order. It leaves all such regulations and inspections to local communities.

The case of *H. P. Hood & Sons* v. *Dumond*, 336 U. S. 525, cited in the appellant's statement, involved a pure case of economic trade barrier legislation having no relation to any health regulation. As said by the Court at page 530:

> "The present controversy begins where the Eisenberg decision left off. New York's regulations designed to assure producers a fair price and a responsible purchaser, and consumers a sanitary and modernly equipped handler, are not challenged here but have been complied with. It is only additional restrictions, imposed for the avowed purpose and with the practical effect of curtailing the volume of interstate commerce to aid local economic interests, that are in question here and no such measures were attempted or such ends sought to be served in the Act before the Court in the Eisenberg case."

The case of *Sheffield Farms Co., Inc.* v. *Seaman* (N.J.) 114 N.J.L. 455, 177 A. 372, cited in appellant's statement, is not comparable. In that case, despite the fact that the plaintiff had a State of New Jersey license to sell milk anywhere in the state and had complied with both city and state laws, it was arbitrarily refused a license by the Board of Health of the City of Perth Amboy solely because the city had enough milk dealers.

In *State ex rel. Larson* v. *City of Minneapolis*, 190 Minn. 138, 251 N. W. 121, the city ordinance in question gave no consideration to the supply of milk available in the area

and provided for no inspection of farms supplying pasteurization plants. Section 7.13 of the Madison ordinance (R. p. 247) provides for a frequent periodical inspection of all farms suplying milk to the pasteurization plants in the Madison area.

Most of the cases cited by appellant involved attempts by cities to contravene standards, contracts or inspection systems established by the states wherein the cities were located and the basis of the decisions was that the state regulation must control. Such cases are *Prescott* v. *City of Borger* (Tex. App.) 158 S. W. (2d) 578; *Urban* v. *Taylor*, (N. J.) 188 Atl. 232; *Wenoka* v. *Rose Lawn Dairy* (Okla.), 212 Pac. (2d) 1056; *Moultrie Milk Shed, Inc.* v. *City of Cairo* (Ga.), 57 S. E. (2d) 199; *La Franchi* v. *City of Santa Rosa*, 8 Cal. (2d) 331, 65 Pac. (2d) 301; *Meridian, Ltd.* v. *Sippy*, 54 Cal. App. (2) 214, 128 Pac. (2d) 884. As pointed out above, Wisconsin leaves the regulation of fluid milk to its municipalities, and the basis of the above mentioned decisions does not apply.

The Illinois cases cited in appellant's statement are all grounded on the fact that the Illinois Cities and Villages Act, which is the sole source of municipal authority in Illinois, specifically provides that a city cannot exercise police jurisdiction beyond one-half mile from its corporate limits. So in *Higgins* v. *City of Galesburg* (Ill.), 401 Ill. 87, 81 N. E. (2d) 520, the court held that the city was without power to inspect and license farms and plants beyond that limit. This decision was followed by the Illinois Court in its decision in *Dean Milk Company* v. *City of Waukegan*, 403 Ill. 597, 87 N. E. (2d) 751, that under the Illinois statutes an Ilinois city has no jurisdiction beyond the one-half mile limit. Further, the court pointed out that no contention was made in that case by the city that it should inspect all sources of milk itself, and it was already accepting milk

inspected by only the City of Winnetka. None of these items is present in the case at bar.

It is respectfully submitted that the questions presented in this appeal do not raise any substantial federal question.

WHEREFORE, Appellees respectfully move that the within appeal be dismised or that the judgment and decree of the Supreme Court of the State of Wisconsin be affirmed.

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Of Counsel.

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In the Supreme Court of the United States

October Term, 1950 - - - - Number 258

DEAN MILK COMPANY, a corporation,

Appellant,

vs.

CITY OF MADISON, WISCONSIN, a Municipal Corporation, DR. C. K. KINCAID, as Health Commissioner for the City of Madison, Wisconsin, LEONARD HOWELL, as City Manager of the City of Madison, Wisconsin, and THE COMMON COUNCIL OF THE CITY OF MADISON, WISCONSIN,

Appellees.

Appeal from the Supreme Court of the State of Wisconsin.

APPELLEES' BRIEF

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SUBJECT INDEX.

	Page
Opinion of the Courts below	1
Statement of the Case	2
Summary of Argument	6
Argument	12
The issue involved is whether the present local regulation of milk supplies is to stand	13
I. The five-mile pasteurization limit in section 7.21 of the Madison ordinances is valid under the Fourteenth Amendment to the Constitution of the United States	13
A. The City of Madison has the right to enact reasonable milk regulations for the protection of public health	15
B. The Madison five-mile pasteurization limit is a reasonable exercise of the city's police powers for the protection of public health	24
1. Appellant's contentions would destroy various recognized rights of municipal control of milk	27
2. Section 11 of the United States Public Health Service suggested ordinance does not assure the receipt of milk of good quality	35
3. Fluid milk regulation and inspection problems are not comparable to those of meats and vegetables	39
4. General Order 125 of the Wisconsin Department of Agriculture does not affect this case	42
5. The State Court cases cited by appellant are not relevant to the Madison ordinance	44
II. The five-mile pasteurization limit in section 7.21 of the Madison ordinances is not invalid under the Interstate Commerce Clause of the Constitution of the United States	51
A. The pasteurization limit is a reasonable exercise of police power for protection of public health. It is not a barrier imposed for protection of local economic interests	52

Page

B. The pasteurization limit does not discriminate against interstate commerce 57

C. The pasteurization limit lies within a field which Congress has recognized is a proper field for local regulation, which Congress has not attempted to regulate and in which federal regulation would be impracticable 59

III. The State Courts properly refused to pass upon the validity of section 7.11 of the Madison ordinances, the twenty-five mile inspection provision, because there was no justiciable controversy between the parties as to that section 67

Conclusion 70

Appendix to Brief (Excerpts from Wisconsin Department of Agriculture, General Order No. 125) 71

AUTHORITIES CITED.

Cases:

Baldwin vs. G. A. F. Seelig, Inc.,
294 U. S. 511, 55 S. Ct. 497 ..... 52, 57

Brimmer vs. Rebman,
138 U. S. 78, 11 S. Ct. 213 58

Carter vs. Commonwealth of Virginia,
321 U. S. 131, 64 S. Ct. 464 59

City of Abilene vs. Tennessee Dairies,
225 S. W. (2d) 429 (Ct. Civ. App. Tex.) 47

City of Electra vs. Carnation Company,
207 S. W. (2d) 192 (Tex. Civ. App.) 36

City of Greenville vs. Cabell's Inc.,
207 S. W. (2d) 898 (Ct. Civ. App., Tex.) 47

Authorities Cited—*Continued.*

	Page
City of Milwaukee vs. Childs Co., 195 Wis. 148, 217 N. W. 703	20
City of Wewoka vs. Rose Lawn Dairy, 212 P. (2d) 1056 (Okla.)	48
Cloverleaf Butter Co. vs. Patterson, 315 U. S. 148, 62 S. Ct. 491	60, 63
Currin vs. Wallace, 306 U. S. 1, 59 S. Ct. 389	63
Dean Milk Co. vs. City of Chicago, 385 Ill. 565, 53 N. E. (2d) 612	20, 21
Dean Milk Co. vs. City of Madison, 257 Wis. 308, 43 N. W. (2d) 480	49, 50, 64
Dean Milk Co. vs. City of Waukegan, 403 Ill. 597, 87 N. E. (2d) 751	44
Duckworth vs. State of Arkansas, 314 U. S. 390, 62 S. Ct. 311	62
Dyer vs. City of Beloit, 250 Wis. 613, 27 N. W. (2d) 733	49, 50
Freeman vs. Hewitt, 329 U. S. 249, 67 S. Ct. 274	59
Gilchrist Drug Co. vs. City of Birmingham, 234 Ala. 204, 174 So. 609	21
Grant vs. Leavell, 259 Ky. 267, 82 S. W. (2d) 283	47
Hauge vs. Chicago, 299 U. S. 387, 57 S. Ct. 241	46
Higgins vs. City of Galesburg, 401 Ill. 87, 81 N. E. (2d) 520	44
H. P. Hood & Sons, Inc. vs. Du Mond, 336 U. S. 525, 69 S. Ct. 657	26, 52, 53, 55, 59, 60
Independent Dairymen's Ass'n vs. City and County of Denver, 142 Fed. (2d) 940 (C. C. A. 10)	21
Koy vs. City of Chicago, 263 Ill. 122, 104 N. E. 1104	18, 19

Authorities Cited—*Continued.*

Page

La Franchi vs. City of Santa Rosa,
8 Cal. (2d) 331, 65 P. (2d) 1301 45

Lang's Creamery, Inc. vs. City of Niagara Falls,
224 App. Div. 483, 231 N. Y. S. 368 ..... 21, 22, 49

Lieberman vs. Van De Carr,
199 U. S. 552, 26 S. Ct. 144 ..... 15-16, 18, 32

McKenna vs. City of Galveston,
143 S. W. (2d) 606 (Ct. Civ. App. Tex.) 49

Meridian, Ltd. vs. Sippy,
54 Cal. App. (2d) 214, 128 P. (2d) 884 ..... 45, 46

Milk Control Board of Pennsylvania vs. Eisenberg Farm Products,
306 U. S. 346, 59 S. Ct. 528 66

Miller vs. Williams,
12 F. Supp. 236 55

Mintz vs. Baldwin,
289 U. S. 346, 53 S. Ct. 611 64

Moultrie Milk Shed vs. City of Cairo,
206 Ga. 348, 57 S. E. (2d) 199 48

Nebbia vs. New York,
291 U. S. 502, 54 S. Ct. 505 17

Parker vs. Brown,
317 U. S. 341, 63 S. Ct. 307 60

Pfeffer vs. Milwaukee,
171 Wis. 514, 177 N. W. 850 20

Prescott vs. City of Borger,
158 S. W. (2d) 578 (Ct. Civ. App., Tex.) 46

Savage vs. Jones,
255 U. S. 501, 32 S. Ct. 75 64

Sheffield Farms Co., Inc. vs. Seaman,
114 N. J. L. 455, 177 Atl. 372 56

State ex rel Larson vs. City of Minneapolis,
190 Minn. 138, 251 N. W. 121 49

State of Minnesota vs. Barber,
136 U. S. 313, 10 S. Ct. 862 58

Page

United States of America vs. Munsingwear, Inc.
(U. S. — decided Nov. 13, 1950) 70

Urban vs. Taylor
117 N. J. M. 887, 188 Atl. 232 47, 56

Witt vs. Klimm,
97 Cal. App. 131, 274 P. 1039 23, 24, 45, 49

Wright vs. Richmond County Dept. of Health,
182 Ga. 651, 186 S. E. 815 49

United States Statutes:

February 27, 1925:
43 Stats. at Large Ch. 358, sections 2, 5, 18;
District of Columbia Code, 1940 Ed., Title 33,
Sections 33-301, 33-305, 33-318 24, 25, 65

State Regulation:

Wisconsin Department of Agriculture General
Order 125 42
(Excerpts set forth in appendix to this
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In the Supreme Court of the United States

October Term, 1950 - - - - - Number 258

DEAN MILK COMPANY, a corporation,

Appellant,

vs.

CITY OF MADISON, WISCONSIN, a Municipal Corporation, DR. C. K. KINCAID, as Health Commissioner for the City of Madison, Wisconsin, LEONARD HOWELL, as City Manager of the City of Madison, Wisconsin, and THE COMMON COUNCIL OF THE CITY OF MADISON, WISCONSIN,

Appellees.

Appeal from the Supreme Court of the State of Wisconsin.

APPELLEES' BRIEF

OPINION OF THE COURTS BELOW

The opinion of the Supreme Court of the State of Wisconsin is reported in 257 Wis. 308, 43 N. W. (2nd) 480, and

is set forth in the Record at pages 290-296. The opinion of the Circuit Court for Dane County is not officially reported, but is found in the record at pages 1-18.

STATEMENT OF THE CASE.

Although the "Statement of the Case" contained in the appellant's brief contains a great deal of material which is argumentative, we do not consider it necessary to discuss that material in detail. We propose briefly to set forth the basic facts involved in the case.

The action is an action for declaratory judgment in which the appellant has sought to have the Court declare that Sections 7.21 and 7.11 of the General Ordinances of the City of Madison, Wisconsin, are invalid under the Interstate Commerce clause in Section 8 of Article I of the United States Constitution, and under the 14th Amendment to the Constitution. The action was tried upon the second amended complaint of the appellant (R. 19-33) and the answer of the appellees thereto. (R. 33-51) At the conclusion of the trial, the Circuit Court for Dane County, Wisconsin, issued its decision that Section 7.21 of the Ordinances, being the five mile pasteurization limit, is constitutional, and that there was no justiciable controversy between the parties as to Section 7.11 of the Ordinances, which provides that the Madison Health Department shall not be obligated to inspect farms located more than twenty-five miles from the City of Madison. (R. 1-19) The basis of the trial court's decision on Section 7.11 was that since the appellant had not contemplated pasteurization within five miles from the city and the court had upheld the five mile pasteurization limit, there was no justiciable controversy, and on the further ground that the

appellant owned no farms which could be affected by the Ordinance. Appropriate Findings of Fact and Declaratory Judgment upholding Section 7.21 and dismissing the complaint as to Section 7.11 was entered in the trial court. On appeal the judgment of the trial court was affirmed by the Wisconsin Supreme Court.

The City of Madison is in the center of Dane County which contains over 5600 farms and produced in 1948 over 640,000,000 pounds of milk. (R. 117 and Ex. 40, R. 197) This is more than ten times the milk used annually in the City of Madison. Large quantities of milk are shipped from Dane County to the Chicago fluid milk market and large quantities are made into cheese, butter, evaporated milk, etc. The area within a radius of 25 miles from the Capitol Square in the City of Madison includes practically all of Dane County and portions of adjoining counties. At present Madison's pasteurized milk is furnished from about 500 farms of which about 60% are located within 10 miles of Madison and the balance within 20 miles. (R. 118) Since at least 1926 all Madison's milk has been supplied from farms within twenty miles of the city. (R. 118)

There are several distributors of milk in Madison, all of whose plants are located within five miles of the Capitol Square: (1) The University of Wisconsin has its own plants for pasteurizing and supplying milk to University Halls and Commons; (2) Rennebohm Farm supplies only the various Rennebohm Drug Stores and does not supply all of the stores' needs; (3) There are three retail and wholesale dealers, the Borden Company, Bancroft Dairy and Bowman Farm Dairy supplying the city. (R. 119-122)

All producers delivering on the Madison market are licensed by the Madison Health Department and are inspected by representatives of the Health Department as

well as by representatives of the dealers and of the Co-operative Association representing the farmers.

Appellant is a Chicago corporation which operate several plants in Illinois. It operates two pasteurization plants located at Chemung and Huntley, Illinois, 65 and 85 miles from Madison, in which it pasteurizes and bottles milk which is labeled "Grade A" milk under the City of Chicago milk ordinances. (R. 8) Its Chemung plant is supplied by about 1150 farms, and its Huntley plant by about 1075 farms. (R. 87) The farms are located in an area about 20 to 25 miles around the plants. (R. 84) It also operates three plants processing other than Grade A milk. The farms supplying milk to appellant and its plants are licensed by the Board of Health of the City of Chicago. They are inspected by representatives of the Chicago Health Department. (R. 80, 84, 85)

The appellant sells pasteurized milk in Chicago and various other cities in Illinois and its milk is sold in some Wisconsin communities. It desires to sell pasteurized milk bottled at its Huntley or Chemung plants to a distributor, Mr. Robert Alder, who will purchase the appellant's milk in Illinois and then proposes to sell it in the City of Madison. (R. 103)

In March, 1948, the appellant applied to the Madison Board of Health for a license to sell in Madison milk bottled in Illinois. The license was refused because the plants were beyond the 5 mile pasteurization limit of the Madison ordinances. On October 1, 1949, a few days before the trial of this action, the appellant applied for 950 Madison farm permit application blanks, but they were not furnished by the Madison Health Department for two reasons: (1) The City did not have that many blanks available, and (2) As testified by Dr. Kincaid, the City Health Commissioner, this action was pending on the validity of the five-mile pasteurization limit and until determination

of that question there was no point in having any Dean producers apply for permits. (R. 69) The Dean Company does not intend to pasteurize within the five-mile limit, but wishes to sell milk in Madison which has been pasteurized and bottled in its Illinois plants. The Dean Company does not own or operate any farms.

There is nothing in the record indicating what action the Madison Health Department would take on any applications for permits by Dean's Illinois producers if the milk were to be pasteurized within five miles of the Capitol Square in Madison, or if the five mile pasteurization should finally be held invalid.

Reference is made in this case to three separate milk ordinances. The Madison milk ordinances are a complete regulation of the production, processing and delivery of milk sold in the City of Madison, and of the milk itself. (R. 237-273)

The five-mile pasteurization limit contained in the present Section 7.21 of the Ordinance was adopted as part of the city's general milk ordinances in 1930, and was retained in a general revision of those ordinances which was effective August 27, 1949. The present Section 7.11 of the Ordinances (125 mile farm inspection provision) was first enacted as part of the revision of August 27, 1949. The standards and requirements of the Madison ordinances are basically those of the U. S. Public Health Service suggested ordinance hereafter referred to, with, however, some additional requirements, and with the five-mile pasteurization limit in Section 7.21 used instead of Section 11 of the U. S. Public Health suggested ordinance, which is the so-called "reciprocal inspection" section of that suggested ordinance.

The appellant now is producing and processing under the provisions of the City of Chicago milk ordinances. The record shows (R. 130-135) that the requirements of the

Madison ordinances are in some respects more rigid than those of the Chicago ordinance.

The third ordinance is that suggested by the U. S. Public Health Service to municipalities for adoption by the municipalities. It is contained in Public Health Bulletin No. 220, 1939 edition, issued by Federal Security Agency, and is largely set forth in the record at pages 161-193. Many of its provisions are found in the milk ordinances both of Chicago and of Madison, but not all of it is found in either ordinance. Section 11 of this suggested ordinance is the so-called "reciprocal inspection" provision thereof. At the time of the trial of this case, an amendment of the suggested ordinance was in process, and Section 11 as amended is found in Exhibit 2 of the Record, page 195. The amended Section 11 provides as follows:

> "Section 11. Milk and milk products from point beyond the limits of routine inspection.—Milk and milk products from points beyond the limits of routine inspection of the municipality of ..... may not be sold in the municipality of ....., or its police jurisdiction, unless produced and or pasteurized under provisions which are substantially equivalent to the requirements of this ordinance and which are enforced with equal effectiveness as determined by a milk sanitation rating."

SUMMARY OF ARGUMENT.

The issue in this case is whether the power to regulate and control fluid milk supplies for the protection of public health by reasonable regulations, shall be denied to local governments. While professing to attack the Madison five-mile pasteurization limit, appellant is, in fact attacking

the present system of local fluid milk regulation for the protection of public health.

I.

The pre-milk pasteurization limit at Section 7.21 of the Madison ordinances is valid under the Fourteenth Amendment to the United States Constitution as a reasonable non-discriminatory exercise of the city's police powers for protection of public health.

The differences between the parties in this action involve the question of local autonomy, within reasonable limits, to adopt and maintain fluid milk standards and the enforcement thereof by local licensing and inspection.

The appellee City of Madison maintains that a municipality in the absence of contrary state law may fix its own fluid milk standards, so long as they are reasonable; may require its own inspection of milk supplies and its own licensing and inspection of all farms and plants which produce and process the milk; hence it may take reasonable steps, such as the ordinance involved herein, to make its enforcement more efficient, and convenient.

The appellant denies these municipal powers by claiming that any fluid milk standards more rigid than those suggested as *minimum* standards by the United States Public Health Service in its suggested ordinance are *ipso facto* unreasonable; that a municipality must accept licensing and inspection of farms and plants by other municipalities on the basis of the "reciprocal inspection" provisions of Section 11 as amended of the United States Public Health Service suggested ordinance.

This Court and courts throughout the country have recognized that fluid milk, because of its importance as food and its perishability and capacity for carrying disease, is properly subject to special minute and rigid municipal regulations which may be drastic restrictions on private business. So long as local fluid milk regulations are not palpably unreasonable or arbitrary, the courts do not interfere with the legislative discretion in the means adopted in such health regulation.

The Madison five-mile pasteurization limit is a reasonable, non-discriminatory fluid milk regulation for the protection of public health. The Record shows that the pasteurization limit was not enacted as any trade barrier or to prevent competition or to protect any interests other than the public health of the City's citizens. The ordinance does not restrict private business any more than any other rigid milk requirement.

Acceptance of appellant's arguments which are basic to its position in this case would prohibit the adoption and maintenance of any municipal milk standards or enforcement provisions more rigid than the standards suggested as minimum by the United States Public Health Service. Madison's fluid milk standards are in fact higher than those of Chicago which govern appellant's milk; whether these higher standards are reasonable has not been involved in or determined by this case. Appellant's contention would destroy these higher standards without regard to whether they are reasonable.

Appellant's argument that "wholesome" milk must be accepted by any community would lead to a break-down of all local milk regulations and would require acceptance of milk regardless of compliance with the local reasonable regulations.

Appellant's contentions would deprive municipalities of power to require their own inspection and supervision of

their milk supplies and would require acceptance of inspection by other municipalities even though such other inspection is considered inadequate.

Congress has recognized the right of localities to license and inspect all sources and suppliers of milk by requiring that all milk shipped into the District of Columbia for fluid milk sales shall be from sources and suppliers licensed and inspected by the District of Columbia health officer.

The United States Public Health Service milk-shed rating system is not an inspection system. It does not include any complete inspection of an entire milk-shed by federal or even state personnel. It is merely a "spot-check" method for occasionally rating the local enforcement on a particular milk-shed to determine average conditions on the milk-shed. The rating of the Chicago milk-shed at more than 90% is not a rating of any given dealer's milk-supplying farms or plants, none of which were necessarily inspected in arriving at the over-all milk-shed rating.

The refusal of a city to rely on such rating of a milk-shed in acceptance of milk from that milk-shed pursuant to the "reciprocal inspection" system suggested by United States Public Health Service in section 11 of its suggested ordinance is neither unreasonable nor arbitrary.

The health problems of meats, vegetables, etc., are not comparable to those of milk. Meat control and inspection does not require the detailed regulation and consistent inspection of farm premises and operations that are required for milk. Hence regulation and inspection which might be unreasonable for meat is entirely reasonable and necessary for milk. Cases dealing with meats are therefore not pertinent to the problems of milk.

The State of Wisconsin has not in any way adopted United States Public Health standards or system for its localities. General Order 125 of the Wisconsin Depart-

ment of Agriculture is an entirely voluntary program for the sales promotion of milk to out-of-state markets which may choose to rely upon the services provided under the order.

None of the state court cases cited by the appellants is relevant to the Madison ordinance situation. All those cases involved either state wide systems of milk regulation and inspection or other facts or state laws not present in the Madison situation. Courts in New York, California and Texas have upheld ordinances similar to the Madison ordinance.

Since the City of Madison has right to fix its own reasonable standards and to license and inspect plants and farms the five-mile pasteurization limit is a reasonable and non-discriminatory method of enforcing these requirements and hence does not violate any provisions of the Fourteenth Amendment.

II.

The five-mile pasteurization limit is not invalid under the Interstate Commerce Clause of the United States Constitution.

This Court has recognized the validity of local health regulations which may affect interstate commerce in areas where uniform national regulation is not required and where Congress has not acted to establish nation-wide regulation.

The Madison ordinance was neither designed to, nor does it operate to, discriminate against interstate commerce in any way. All persons, whether doing business intrastate or interstate, are equally subject to the ordinance. The ordinance does not prohibit interstate commerce.

Congress has not attempted any regulation of milk in interstate shipment. It has left the field to local action as is specifically shown by the statutes regulating introduction of fluid milk into the District of Columbia. Any federal uniform regulation of fluid milk would be impractical. It would require not only federal inspection of milk and milk plants but also frequent inspection of hundreds of thosands of individual producing farms.

Local action to regulate and control milk for fuild consumption being within the power of local governments and the Madison ordinance being a reasonable and non-discriminatory regulation, the ordinance is not invalid under the Interstate Commerce Clause.

III.

The state courts properly refused to pass upon the validity of section 7.11 of the Madison ordinances, being the twenty-five miles inspection provision.

There was no justiciable controversy between the parties to this action concerning section 7.11 because the five-mile pasteurization limit of section 7.21 of the ordinances was upheld and the appellant does not propose to pasteurize its milk within the permitted area.

The Madison Health Department has taken no action and has adopted no policy concerning licensing or inspection of the farms supplying appellant's milk in Illinois and has not stated what its position would be if there were no five-mile pasteurization limit.

There has been no determination by any court in this action of any rights of appellant or of any other person under section 7.11 of the Madison ordinance. Nothing in

this action would prevent such a determination in the future upon the suit of any proper party.

ARGUMENT.

This case is of importance to the entire question of the protection of public health through regulation and control of milk sold throughout the nation for consumption as fluid milk. It involves the right of local governments—states and municipalities thereof—to establish and maintain their own health standards for, and control over, milk sold for consumption within areas of their police jurisdiction. Here, for the first time in this Court, claim is made that such local governmental units should be deprived of their autonomy in the reasonable regulation of such milk for the protection of the health of their citizens. Appellant claims that every locality in the country should be forced to accept, as maximum milk standards, the standards suggested by the United States Public Health Service as minimum standards, and should be forced to accept the so-called "reciprocal inspection" system for accepting milk from other localities suggested by that Service. Appellees maintain that in the absence of Federal or State regulation and inspection each locality has a right to determine for itself, within reasonable limits, what standards, regulation and inspection it may impose and require for the protection of public health and to adopt measures to make the operation of its regulation and inspection more efficient and economical.

The question is not, as stated by the appellant (Brief, p. 47), whether the competitive system of the country is

to stand. The question is, instead, whether local regulation of milk supplies for the protection of public health is to stand. While appellant professes to be attacking the five-mile milk pasteurization limit contained in section 7.21 of the City of Madison general ordinances, it is, in actuality attacking the whole milk regulatory system of the country as it is now, and has always been, constituted.

Throughout its brief appellant has intermixed arguments dealing with the provisions of section 7.21 and section 7.11 of the Madison ordinances and arguments under the Fourteenth Amendment and the Interstate Commerce Clause of the United States Constitution. The State courts in this case properly recognized the two ordinance provisions were entirely separate matters. They upheld the validity of Section 7.21 and refused to pass upon the validity of section 7.11. We propose in this brief to consider separately the matters of validity of section 7.21 (the five-mile pasteurization limit) under the Fourteenth Amendment and under the Interstate Commerce Clause, and at the end of the brief to deal with section 7.11 of the Madison ordinances.

I.

The Five-Mile Pasteurization Limit in Section 7.21 of the Madison Ordinances Is Valid Under the Fourteenth Amendment to the Constitution of the United States.

The Milk regulation ordinances of the City of Madison (R. 237-273), require inspection by Madison Health Department personnel of all milk sold in the City and require the licensing and inspection by the Madison Health Department of all farms where that milk is produced and of

the plants where it is processed. The ordinances contain detailed regulations covering all phases of the production, processing and distribution of milk. The five-mile pasteurization limit contained in section 7.21, which was originally adopted in 1939, and which is the provision attacked by appellant, is a part of the over-all milk ordinances.

Appellant's attack on the five-mile pasteurization limit under the Fourteenth Amendment of the Constitution of the United States is based principally on the due-process provision thereof. On a due-process attack on a local health measure, the issue involved is whether the provision attacked is palpably unreasonable and arbitrary. The appellees contend this five-mile pasteurization limit is a reasonable health regulation and a legitimate exercise of the police power of the City of Madison.

The differences between the parties on this point may be easily summarized. The City of Madison maintains that it, or any other municipality, has the right in the absence of State law to the contrary: (a) to set its own health standards for milk to be sold in the City and for the production, processing and delivery thereof, so long as those standards are reasonable; (b) by its own personnel to inspect such milk at all stages of production, processing and delivery; (c) to license and inspect with its own personnel all farms where such milk is produced and all plants where it is processed and bottled, and (d) having these rights, the City of Madison may take steps which tend to assure that the processing plants and the farms which produce the milk are within a convenient and efficient inspection distance from the City, and the five-mile pasteurization limit involved in this action is designed to accomplish that purpose and hence is a reasonable health requirement.

The appellant's argument is (a) that any municipal standards for fluid milk, and for the production and pro-

cessing thereof, which are higher or more stringent than the minimum standards suggested by the United States Public Health Service in its suggested "Milk Ordinance and Code" (Public Health Bulletin No. 220), are *ipso facto* unreasonable; (b) that the City of Madison must accept milk from any milk-shed which has been rated 90% or more according to milk-shed rating procedures suggested by the United States Public Health Service; (c) that it is unreasonable for the City of Madison to require its own licensing and inspection of the farms and plants located on such a milk shed, and (d) that, consequently, the City of Madison may not take steps to make the licensing and inspection of the plants and farms which supply the City more efficient and convenient by requiring that milk sold in the City shall be pasteurized within five miles of the City.

Appellees contend that the reasonable exercise of its police power by a municipality for the protection of the health and welfare of its citizens has always been sanctioned under the Fourteenth Amendment and that the five-mile pasteurization limit contained in section 7.21 of the Madison ordinances is such a reasonable exercise of the City's police powers.

A — The City of Madison has the right to enact reasonable milk regulations for the protection of public health.

This Court has on many occasions recognized that when it comes to the protection of public health or the promotion of public welfare, state and local regulations which are reasonably designed to promote those public interests meet all requirements of the due-process clause of the Fourteenth Amendment to the Constitution. In *Lieberman*

vs. Van De Carr, 199 U. S. 552, 26 S. Ct. 144, a New York City milk dealer attacked provisions of the New York City Sanitary Code which required licensing of milk dealers on the grounds that it violated the various provisions of the Fourteenth Amendment and on the further ground that the City admitted that his milk "stood well"—i.e. that it was "wholesome." The Court recognized the necessity of milk regulation and the scope of local powers of regulation as follows, 199 U. S. 552 at 563:

> "We have, then, an ordinance which, as construed in the highest court of the State, authorizes the exercise of a legal discretion in the granting or withholding of permits to transact a business, which, unless controlled, may be highly dangerous to the health of the community, and no affirmative showing that the power has been exerted in so arbitrary and oppressive a manner as to deprive the appellant of his property or liberty without due process of law.
>
> "In such cases it is the settled doctrine of this court that no Federal right is invaded, and no authority exists for declaring a law unconstitutional, duly passed by the legislative authority and approved by the highest court of the State. Nor do we think there is force in the contention that the appellant has been denied the equal protection of the laws, because of the allegation that the milk business is the only business dealing in foods which is thus regulated by the sanitary code. All milk dealers within the city are equally affected by the regulations of the sanitary code."

In *Hauge vs. Chicago*, 299 U. S. 387, 57 S. Ct., 241, this Court sustained an ordinance of the City of Chicago which

required all merchandise sold in the city in load lots by weight to be weighed by a public weighmaster in the city even though that required the expense and burden of unloading and reloading each truck after arrival in the city and even though the load had been weighed upon state tested scales at the point of loading. The Court said, 299 U. S. 387 at 392:

> "That the coal delivered by appellant was weighed at the mine on tested scales (tested by State authorities) is stressed; but this is not really material. Chicago had no control there and such weighing afforded no adequate protection against fraud. The opportunities for manipulation therefore are obvious.
>
> "Invalidity of the ordinance cannot be established by suggesting some other less burdensome procedure, which possibly might accomplish the end in view—honest delivery weight. The City may act with proper legislative discretion. Here there is nothing to show action so arbitrary, unreasonable, or discriminatory as to require us to overthrow its deliberate effort to meet a plain evil."

In upholding the New York State Milk Control Law against a due-process attack this Court in *Nebbia vs. New York*, 291 U. S. 502 at 537 said:

> "So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. * * * With

> the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. The course of decision in this court exhibits a firm adherence to these principles. Times without number we have said that the Legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power."

In connection with these cases, we call the Court's attention to the fact the trial court specifically found that the five-mile limitation "constitutes a reasonable and proper health regulation for the protection of the lives and health of the residents of the City of Madison." (R. 54) The Wisconsin Supreme Court affirmed this finding. (R. 295)

All courts which have given proper consideration to the special health problems involved in the sale of fluid milk have recognized that special precautions are necessary and that wide latitude of regulations is given localities. In *Lieberman vs. Van De Carr*, 199 U. S. 552, this Court recognized there was no denial of equal protection of the laws because the City of New York Sanitary Code made milk, along among foods, subject to special regulation and licensing. In *Koy vs. City of Chicago*, 263 Ill. 122, 104 N. E. 1104, a dealer attempted to avoid compliance with a detailed pasteurization ordinance of the City of Chicago on the ground his milk was "clean" and "pure." The Court's decision contains an excellent summary of the peculiarities of milk which demand special regulation. This summary has been widely quoted by the courts.

"There is no article of food in more general use than milk; none whose impurity or unwholesomeness may more quickly, more widely, and more seriously affect the health of those who use it. The regulation of its sale is an imperative duty which has been universally recognized. This regulation in minute detail is essential, and extends from the health and keeping of the cows which produce the milk, through all the processes of transportation, preservation, and delivery to the consumer. Not only may laws and ordinances require that milk offered for sale shall be pure, wholesome, and free from the bacilli of any disease, but they may and do, in order to produce this result, prescribe the manner in which such purity, wholesomeness, and freedom from disease shall be secured and made to appear. The cows may be required to be registered with a designated public authority; the dairies to be conducted and managed according to prescribed regulations, and together with the dairy utensils, subjected to inspection; the receptacles in which milk is contained to be of prescribed character and capacity; the labels to be placed according to fixed regulations, and to contain certain required information; the milk to be prepared in the manner, at the times, and by the means directed, and at all times to be subject to inspection. These may be drastic restrictions upon a private business; but experience and the increasing knowledge of the causes of disease and the agencies of its propagation have demonstrated the necessity of such restrictions to the preservation of the public health."

Koy vs. City of Chicago,
263 Ill. 122, 130, 104 N. E. 1104, 1107.

See also:

Pfeffer vs. Milwaukee,
171 Wis. 514, 517, 177 N. W. 850;
City of Milwaukee vs. Childs Co.,
195 Wis. 148, 217 N. W. 703.

Survey of all cases which have upheld stringent local milk regulatory provisions would be unproductive here. We believe a typical case, illustrative of the general court decisions throughout the country is *Dean Milk Co. vs. City of Chicago*, 385 Ill. 565, 53 N. E. (2d) 612, where the appellant in this case attacked a Chicago ordinance permitting delivery of milk only in glass bottles and prohibiting delivery in paper containers. The dealer claimed paper containers were widely accepted in other communities; and there was extensive testimony on the relative sanitary merits of paper and glass. In upholding the ordinance, the court recognized the right of local communities to set their own reasonable milk standards:

> "The maintenance of a pure and wholesome milk supply is one of the principal concerns of municipal government. The regulation of the sale and distribution of milk is vital to the preservation of public health. The City of Chicago had the power and authority to enact an ordinance regulating and prescribing the containers in which milk in quantities of less than one gallon should be delivered within the city. We express no opinion as to the health merits of the controversy as between the single service Pure-Pak (paper) containers and the standard (glass) milk bottles. The evidence shows some valid reasons which the city council might well consider in requiring the use of the standard milk bottle. It is at least debatable and in such a case the city council is entitled to use its own legislative dis-

cretion and the courts will not disturb its action. The council is the sole judge of the necessity and wisdom of the ordinance enacted, and we are concerned only with its reasonableness * * *"

Dean Milk Co. vs. City of Chicago,
385 Ill. 565, 579.

Independent Dairymen's Ass'n vs. City and County of Denver, 142 Fed. (2d) 940 (CCA, 10), upheld a Denver ordinance prohibiting sale of milk in gallon bottles. *Gilchrist Drug Co. vs. City of Birmingham*, 234 Ala. 204, 174 So. 609, sustained a municipal ordinance requiring a particular method of freezing ice cream, over the objection that plaintiff's method was just as sanitary. These examples of various milk regulatory ordinances are illustrative; a great variety of cases are set forth in the annotation in 155 *A. L. R.* 1383, at 1395 et seq. and prior annotations there mentioned.

State courts which have considered ordinances similar to that involved herein, where facts were similar to those involved herein, have upheld the ordinances. *Lang's Creamery, Inc. vs. City of Niagara Falls*, 224 App. Div. 483, 231 N. Y. S. 368 (affirmed on other grounds, 251 N. Y. 343), involved an ordinance that all milk sold as pasteurized within the City of Niagara Falls must be pasteurized within the city limits. The plaintiff's milk was pasteurized in Buffalo and generally met all state and local requirements except for place of pasteurization. The Court concluded that the ordinance was not discriminatory, unreasonable, or unconstitutional and that its enforcement did not unlawfully interfere with property rights, nor hinder lawful trade:

"Whatever may be said of other methods of insuring wholesomeness in milk, pasteurization in

these days concededly tends to render milk wholesome. If any person desires to sell pasteurized milk, as such, in the City of Niagara Falls, the city, in the interest of the health of its citizens and visitors, has a right to know that the pasturization comes up to all reasonable standards of perfection. It has a right to be assured that slovenliness, unsanitation, or unscientific workmanship do not result in unwholesomeness. If a milk vendor in the City of Niagara Falls may pasteurize 100 feet outside the city limits, he may do so in the City of Syracuse, or at any far distant point. As to milk pasteurized outside the city and shipped in for consumption, the authorities in Niagara Falls could not be assured of wholesomeness without thoroughly examining and testing the milk in every bottle or other vessel brought into the city. The only adequate way of insuring proper pasteurization outside the city would be by inspection under the control of these defendants, through scrutiny, not only of the character of the plant as to sanitation, etc., but of the work done up to and including inclosing in containers for shipment."

"The argument that the city might thus inspect pasteurizing plants and charge the expense to the milk dealers is hardly reasonable; for the record does not indicate that there is any way in which the city could require milk dealers to pay such expense. The ordinance is a general one, and must be considered in its general application. It applies to dealers whose pasteurization plants are located at long distances from the City of Niagara Falls, as well as to any who may operate near to the city line."

Lange's Creamery, Inc. vs. City of Niagara Falls, 244 App. Div. 483, 231 N. Y. S. 368, 372.

In *Witt vs. Klimm*, 97 Cal. App. 131, 274 P. 1039 (Dist. App. Ct., hearing denied Cal. Sup. Ct.), an ordinance of the City of San Francisco required pasteurized milk sold in the city to be pasteurized within the city and county of San Francisco. The California State "Pure Milk Law" established uniform regulation for production and sale of milk, with a provision for establishment and maintenance of milk inspection services by municipalities or groups of municipalities, under which the city and county of San Francisco had its own inspection services and the County of San Mateo, where plaintiff's milk was produced and pasteurized (two miles from limits of the city and county of San Francisco), had its own service. The milk and pasteurization processes complied with the state law and San Francisco ordinances; only the place of pasteurization barred the milk from San Francisco. The court upheld the ordinance as not unreasonable or discriminatory against outside dealers:

> "The provision of the ordinance requiring that the milk be pasteurized within the city and county of San Francisco is simply a new and additional and more stringent regulation than that contained in the state law on the same subject. These requirements of the ordinance are not in themselves unreasonable or discriminatory and do not conflict with the state law, therefore, both may stand."
>
> "If petitioners' contention be sound, and the health department of the city and county of San Francisco be required to go to Colma and there inspect petitioners' pasteurization plant, there would be nothing to prevent all outside dealers in milk from requiring the same thing, and the health department would be called upon to make inspections of pasteurization plants in many of the other coun-

ties of the state such as Almeda, Solano, Contra Costa and possibly others. It goes without saying that such a requirement of the health department would not only be unreasonable and exceedingly expensive, but it would seriously impair, if not wholly destroy, the efficiency of the entire inspection service."

Witt vs. Klimm,
97 Cal. App. 131, 135.

Thus, all courts recognize municipal powers to maintain detailed milk regulations even though they seriously affect private business. They further recognize that such regulations will not be annulled unless palpably in excess of legislative powers. In the two cases last cited, ordinances in all practical respects identical to that involved herein were upheld as reasonable and non-discriminatory.

B — The Madison five-mile pasteurization limit is a reasonable exercise of the City's police power for the protection of public health.

Appellant's whole argument attacking the Madison five-mile pasteurization limit contained in Section 7.21 of the Madison ordinances as unreasonable is a contention that the failure of a city to accept milk from another milkshed on the basis of the "reciprocal inspection" provision in section 11 of the so-called "Model Ordinance" suggested by the United States Public Health Service is palpably unreasonable and arbitrary. Appellant would deny to a city the right to set any milk standards higher than those in the "Model Ordinance" and would deny to a city the right of licensing and inspection of, indeed of any con-

trol over, milk originating on another milk-shed and the farms and plants which produce and process that milk. Appellant would have this court declare that the milk standards of the suggested "Model Ordinance" which the United States Public Health Service itself has suggested as only *minimum* standards (R. 146), are in fact the *maximum* standards to be permitted any municipality in the country; and that the suggested "reciprocal inspection" provisions of Section 11 of the "Model Ordinance" are in fact obligatory on every municipality.

It is submitted that these contentions of the appellant are demonstrably untenable. A brief consideration of the matter shows it is not unreasonable for a city to set its own reasonable standards and to require the inspection of its milk and the licensing and inspection of the sources thereof and of the plants which process the milk; and it is not unreasonable for Madison to increase the efficiency and reduce the cost of its licensing and inspection by its five-mile pasteurization limit, which requires pasteurization plants to be close at hand, which tends to utilize the more-than-adequate nearby sources of milk.

Before beginning consideration of these matters, however, it is necessary to correct appellant's constant inferences and direct assertions that the purposes of the contested ordinance are to impose "economic protection" (Brief, pagg 59), and to "prevent plaintiff from selling milk in Madison for the purpose of avoiding local competition" (Brief, page 68), and that the ordinance is a "trade barrier," etc. These assertions and epithets are completely and entirely negatived by the record in this case. Dr. Louis Fauerbach, Assistant Health Commissioner of Madison since 1923, testified the purpose of the enactment of the ordinance in 1930 was convenience and efficiency of inspection and controlling standards and

utilization of nearby sources of milk. (R. 129) That testimony is undisputed in the record; nor does the record disclose any intention whatever of the City to prevent competition or to protect anyone from competition. Nothing in the ordinance, or in any other Madison ordinance, precludes the appellant from establishing a pasteurization plant within five miles of the city and from selling milk from that plant in the city so long as appellant is willing to conform to Madison health standards and regulations. There is no prejudice on the part of the city against appellant or any attempt to limit competition. The ordinance under consideration was adopted as a bonafide health measure, and for no other purpose. The issue is solely whether it is so palpably unreasonable and arbitrary an exercise of the city's police power for the protection of public health as to exceed the city's constitutional powers.

It is not disputed that the ordinance provision "bears adversely" (See *H. P. Hood & Sons vs. DuMond*, 336 U. S. 525, 531), on the appellant as well as on all others who are required to comply with it. Of necessity, every health regulation bears adversely on the business of those who are subject to it. Madison's prohibition of the sale of raw, unpasteurized milk in the city (a most common municipal prohibition, of unquestioned legality), adversely affects the business interests of all those who might wish to sell raw milk and might wish to prove that their milk is produced under excellent conditions and is in fact pure and wholesome . That the ordinance provision involved in this case adversely affects appellant, because appellant is unwilling to comply with it, most assuredly does not make the regulation a "trade barrier" or indicate any of the improper intentions charged by appellant against the city.

1. *Appellant's contention would destroy various recognized rights of municipal control of milk.*

What are the rights of a city to regulate and control its milk supply? Unquestionably, to the extent such action is not prohibited by state constitution or legislation, a city may enact and maintain reasonable fluid milk regulations to preserve the public health, including the licensing and inspection of dairy plants and farms, at least on its own milk-shed. Appellant's contentions, however, would deny the City of Madison this power. Many farms within twenty-five miles of Madison, its normal milk-shed, deliver their milk to Chicago and are licensed and inspected by the Chicago Board of Health. (R. 119) If appellant's contentions were followed, since the entire Chicago milk shed in 1947 had a rate of 90% or more under the United States Public Health Service rating system, it would be unreasonable and improper for Madison to insist on licensing or inspecting any of these near-by farms from which a Madison distributor might wish to purchase milk. Madison would thus be forced to accept Chicago inspection even of milk produced in Madison's immediate environs, and this despite the fact that, as the Madison Chief Dairy Sanitarian testified, Madison's health department, because of past experiences, would not be satisfied with Chicago inspection. (R. 123)

Nor is a municipality denied the right to set milk production health standards which are more stringent than the minimum standards presently suggested by the United States Public Health Service, so long as they are reasonable. But to accept appellant's argument in this case would amount to a mandatory limitation of all localities in the country to the United States Public Health Service's present suggestions for minimum requirements. Even the United States Public Health Service itself does not object

to the use of higher requirements. (R. 147) The "Foreword" to "Public Health Bulletin, No. 220," which contains the suggested ordinance, points out that "upward modifications" in a local ordinance will not bar the locality from being included in the lists issued from time to time by the United States Public Health Service of communities which have adopted the suggested ordinance. (See United States Public Health Service "Public Health Bulletin No. 220," 1939 Ed., page VIII) The United States Public Health Service suggested ordinance, if adopted in full by a community, would permit the sale of raw, unpasteurized milk (R. 171); most assuredly that does not prevent a community from prohibiting the sale of unpasteurized milk, as does Madison. (R. 264)

Furthermore, the United States Public Health Service itself from time to time amends and strengthens its suggested minimum requirements. In an amendment in process of approval at the time of trial of this case (R. 158), the Public Health Service reduced the temperature to which raw milk produced for pasteurization must be cooled immediately after milking from 70 degrees F. (See Ex. 1, Item 23 r, R. 178) to 60 degrees F. (See Ex. 2, Item 23 r, R. 194) Was this "upward revision" of its own suggested ordinance by the United States Public Health Service unreasonable? Clearly not—and no more so is it unreasonable for Madison, among its various "upward revisions" from the suggested ordinance, to require cooling to 60 degrees F. (Ex. 45, R. 258) before that standard was adopted by the United States Public Health Service. Appellant's contention, that the enforcement by a community of any standards higher than those currently suggested by the United States Public Health Service is ipso facto unreasonable, obviously cannot be sustained.

Appellant's assertion that its milk is produced under ordinances which are "the equivalent of the Madison ordinance" (Brief page 40) is contrary to the record. It is conceded that appellant's milk is produced under the City of Chicago milk ordinances, and that so far as the record is concerned, the milk and the farms on which it is produced meet the requirements of the Chicago ordinance. The record also conclusively shows that in various respects, as testified to by Dr. Louis Fauerbach, Assistant Health Commissioner of Madison, the requirements of the Madison ordinance are higher than those of Chicago. (R. 130-134) Dr. Fauerbach also testified that in his opinion Madison's higher requirements conduce to a higher and cleaner quality of milk, and that milk which meets the Chicago ordinance does not meet the Madison ordinance. (R. 135) Appellant attempts to belittle these differences as "trifling" (Brief, page 66) and "unsubstantial" (Brief, p. 40). True it is that the trial court made no finding that the differences between the Madison and Chicago ordinances are substantial, because the relative merits of the two ordinances and the reasonableness of Madison's additional requirements were not before the court for determination. However, the trial court most assuredly did not refer to the differences "in disgust" (Appellant's brief, p. 66); it merely properly held that consideration of the differences was unnecessary to decision of the constitutional question of validity of the five mile pasteurization limit, which was the only question before the court. (R. 6) The fact that the differences exist was introduced to show, and it conclusively shows, that forcing Madison to accept milk produced under the Chicago ordinance, as appellant is attempting to do by its argument that any milk which is wholesome enough for Chicago must be held wholesome enough for Madison, will force Madison to abandon all of its ordinance requirements which are more

stringent than Chicago's, and which Madison has believed desirable for the protection of public health, and regardless of the reasonableness of those requirements.

The reasonableness of those more stringent Madison provisions has not been involved and has not been passed upon at any time in this action. Possibly appellant would concede, however, that at least one of Madison's more stringent requirements—that milk be cooled on the farm to 60 degrees F. (R. 258) while Chicago requires cooling only to 65 degrees F. (R. 134)—is reasonable, since the United States Public Health Service even at the time of trial of this action was adopting the 60 degrees F. standard. (R. 194, 158) It is not inconceivable that the United States Public Health Service may in the future adopt others of Madison's "upward revisions" for its suggested minimum requirements. Meanwhile must Madison, or any other community, be required to foreswear improvement and increased stringency in its milk ordinances on the ground that such improvements have not yet been adopted by the United States Public Health Service as recommended minimum requirements, and hence are deemed *ipso facto* to be unreasonable and arbitrary? That is necessarily the effect of appellant's argument. It is submitted that such a determination would clearly not be in the public interest in the protection of public health; it would inevitably freeze all fluid milk health regulations at the present level of the United States Public Health Service suggested *minimum* standards and would slow down the progress of development of more adequate milk standards which has been in process on the state and municipal levels for many years.

Furthermore, appellant's contention that "wholesome" milk must be accepted by a community (e. g. Brief p. 68), even though it has not been produced under reasonable standards and regulations of the community, strikes at the very validity of all detailed fluid milk production

regulations. Presumably, appellant considers milk to be "wholesome" if the bacteria and other tests of the milk on delivery to the consumer are within recognized limits, irrespective of the conditions under which the milk is produced. Certainly it is not impossible for a careful operator to produce milk which is "wholesome" on a farm and by methods which fail to meet many of the farm requirements of any of the ordinances in the record of this case. If such milk may be forced on Madison because it is "wholesome," even though it was not produced under conditions required by the Madison ordinances (assuming those requirements are reasonable, which is not at issue in this case), then, by the same token, that milk is entitled to be accepted by the City of Chicago despite the fact that the lesser Chicago ordinances have not been complied with. Any provisions of the Chicago, or of any other city's, ordinances could be by-passed and be made nugatory by any distributor demonstrating that his milk is "wholesome" without compliance with the ordinance provisions.

What is "wholesome" milk, who is to determine whether given milk is "wholesome" and what standards are to be used? We submit the only proper and feasible answers to these questions, which are raised by appellant's position in this case, are: "wholesome" milk, so far as any individual community is concerned, is only milk which meets all the standards and requirements imposed by the community on the milk itself and on all phases of production, processing and delivery thereof, provided that those requirements are reasonable. Whether milk is to be considered "wholesome" is to be determined by each community (state, or municipality thereof in the absence of state regulation) by the standards of its own regulatory statutes or ordinances; so long as they are reasonable. Any other answers would allow a wholly new and hitherto unknown test of the validity of milk health regulations; they

would eliminate the recognized test, "Is this regulation a reasonable exercise of the police power for protection of the public health?"—and substitute therefor the test—"Is it *possible* for a given distributor or given farm operator to produce wholesome milk without compliance with the particular ordinance?" Such would, it is submitted, lead to complete chaos and inevitably cause the breakdown of all milk regulatory standards. This court in *Lieberman vs. Van De Carr*, 199 U. S. 522, recognized in effect, that a claim of "wholesomeness" does not exempt a dealer from regulation.

It is further submitted that a community has the right of inspection of all farms and plants which produce and process the milk sold in the community as well as of the milk itself. This right the appellant would deny, claiming that it is unreasonable and arbitrary for a city to require inspection by its own personnel of farms and plants delivering on another milk-shed which has been rated 90% or more according to the rating procedures recommended by the United States Public Health Service. By its argument, appellant attempts to force the entire local milk regulatory system of the country into the mold of the so-called "reciprocal inspection" provision of Section 11 of the United States Public Health Service suggested ordinance as recently revised. (Ex. 2, R. 193-195)

Appellees maintain that it is within the right and power of local governmental units to determine whether to insist on their own licensing and inspection of farms and plants whose milk is sold within the limits of their police jurisdiction, or whether to be satisfied with milk from other milk-sheds on the basis of licensing and inspection by some other local government.

Normal regulatory ordinances, as typified in the record of this case by the United States Public Health Service's

suggested ordinance and the actual Chicago and Madison ordinances, contain minutely detailed requirements covering farm conditions under which milk is produced. No such ordinance is satisfied with inspection of raw milk as it is delivered to the pasteurization plants (R. 85), or of the pasteurized product. No claim is made by appellant that such minute regulation of farms and plants is not necessary for the protection of public health. Granting the necessity for such detailed regulations, it is not unreasonable for a city to insist on its own enforcement of such regulations by its own licensing and inspection.

As stated by Dr. Fauerbach, long time Assistant Health Commissioner of Madison, the matter of personality enters into milk and farm inspection. He would not trust any inspection outside of Madison's jurisdiction where the city would not have control and constant supervision of the inspection personnel: there is no substitute for regular inspection by the city's own personnel. (R. 135) Dr. Starr Nichols, Assistant Director of the Wisconsin State Laboratory of Hygiene and Professor of Sanitary Chemistry at the University of Wisconsin, emphasized the necessity of constant and close supervision over farms, that an ordinance must be enforced, and that is not unreasonable for Madison to require inspection of plants and farms. (R. 159) This reasoning is clearly behind the very common requirement in municipal ordinances of licensing and inspection of all farms delivering in the municipality.

To deny the right to impose and enforce such requirement affects not only Madison but many large population centers. The City of Chicago maintains its own inspectors for milk produced in the Madison milk-shed but going to Chicago. (R. 119) The United States Congress has recognized the right of localities to license and inspect all sources of production by requiring that all milk shipped into the District of Columbia for fluid milk sales shall be

from sources licensed and inspected by the health officer of the District. The Act of Congress approved February 27, 1925 (43 Statutes at Large, Chap. 358; District of Columbia Code, Title 33, Sections 33-301 to 33-322), provide the municipal health regulations for fluid milk sold in the District of Columbia. While it is unnecessary to quote them in detail, we call the court's attention to the following sections:

> "No person shall keep or maintain a dairy or dairy farm within the District of Columbia, or produce for sale any milk or cream therein, or bring or send into said District for sale, any milk, cream, or ice cream without a permit so to do from the health officer of said District, and then only in accordance with the terms of said permit. * * *
>
> (43 Stat. 1004, Ch. 358, Sec. 2; Title 33, District of Columbia Code, 1940 Edition, Sec. 33-302)

> "Failure or refusal on the part of any person holding a permit under authority of sections 33-301 to 33-319 to permit the health officer of the District of Columbia, or his duly appointed representative, to inspect the dairy, dairy farm, cattle and all appurtenances of such dairy, dairy farm, or other places where said milk, cream, or ice cream are produced, stored, manufactured, handled, offered for sale, or sold may be deemed sufficient to suspend or revoke such permit at the discretion of said health officer.
>
> (43 Stat. 1005, Ch. 358, Sec. 5; Title 33, District of Columbia Code, 1940 Edition, Sec. 33-305)

"No person in the District of Columbia licensed under Sections 33-301 to 33-319 shall receive any milk or cream from any source until he shall have first ascertained from the health department that the person from which such milk is obtained holds a license from the health officer of said District to send milk or cream into the District of Columbia."

(43 Stat. 1008, Ch. 358, par. 18; Title 33, District of Columbia Code, 1940 Edition, Sec. 33-318)

Thus, Chicago, the District of Columbia and Madison all require licensing and inspection by their own personnel of all farms, milk from which is sold within those areas. The record in this case does not show how many other communities in the country have similar requirements. Appellees maintain that denial of this right of inspection, which would inevitably follow from acceptance of appellant's argument, is wholly unjustified.

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2. *Section 11 of the United States Public Health Service suggested ordinance does not assure the receipt of milk of good quality.*

A brief examination of the so-called milk-shed grading system used under the auspices of the United States Public Health Service, which appellant claims must be relied on by a municipality if it would avoid the taint of unreasonableness in its milk regulation, demonstrates that the position taken by Madison and other cities is not unreasonable.

The grading or scoring system which is suggested by United States Public Health Service as the basis for acceptance of milk from another milk-shed does not in any way

involve continual inspection or a complete inspection of the milk-shed by U. S. P. H. personnel. The rating system was primarily set up to help evaluate the enforcement procedures of the local health department having authority over the particular milk-shed. (R. 144) As applied to the Chicago milk-shed and the Chicago Health Department, under whose supervision the appellant's milk is produced, the record shows that the rating is made by a "spot check" system which involves the inspection of only two hundred farms out of the total of more than ten thousand farms on the Chicago milk-shed and of the same proportion of pasteurization plants. (R. 145) The individual farm and plant inspections are scored and averaged out to result in a single rating for the farms and a rating for the pasteurization plants of the entire milk-shed. The inspection and rating work is done by State Board of Health personnel using procedures recommended by the United States Public Health Service. The final rating does not necessarily give an accurate indication of the quality of the actual milk produced on the majority of the farms on the milk-shed. (R. 145) The ratings are compliance ratings and not safety ratings and do not necessarily mean that all of the milk supplies on the milk-shed involved are safe, even if the rating is more than ninety per cent. (R. 147) Specifically applied to the Dean Milk Company, the rating of more than ninety per cent for the entire Chicago milk shed relied upon by appellant, which was made in 1947 (R. 198), may not have included inspection of any of the farms supplying the appellant's plants, or any of the appellant's plants themselves. (R. 157)

Exhibit 3 (R. 195), a letter to Dean Milk Company from the United States Public Health Service, relied upon by appellant to establish a rating of its own milk (R. 84), merely shows the rating of the entire Chicago milk-shed. (R. 157) In this connection, *City of Electra vs. Carnation*

Co., 207 S. W. (2d) 192 (Texas Civ. App.), is commended to the Court's attention. There an ordinance attempted to permit entry of milk which was rated 90% or better "on the basis of the Public Health Service Rating Method." Recognizing that the ordinance confused grading of milk with rating of milk-sheds and hence set no milk standards whatever, the court said, 207 S. W. (2d) 192, 194:

> "The (U.S.P.H.) suggested rating of a milk-shed is not designed or intended to determine the grade or quality of the milk of a given producer or processor in such area, but only to show the average conditions prevailing in the entire area * * * "

There is nothing in the so-called "Model Ordinance" which would require a city to rely on this "spot check" system. (R. 147) The last rating of the Chicago milk-shed was made about two years before the trial of this case. (R. 198) Yet the appellant claims it is unreasonable and arbitrary for the City of Madison, or for any other City to refuse to accept milk from any other milk-shed in the country wholly on the basis of inspection made by the health officer with supervision over that milk-shed plus a rating of ninety per cent of the entire milk shed. Clearly, the appellant's position is untenable.

It is submitted there is nothing on the record in this case which would justify the conclusion that the refusal by a municipality to rely on this so-called reciprocal inspection system and the insistence of that municipality on inspection by its own personnel is so unreasonable and arbitrary that this court should deny the right to all cities in the country of controlling their own inspection of their milk supplies.

Appellant's brief states that from fifteen hundred to two thousand localities in the country have adopted the suggested "Model Ordinance." Nothing in the record

shows how many of them have or have not adopted the reciprocal inspection feature found in section 11 thereof. That the City of Janesville, Wisconsin, has decided to accept milk from the Chicago milk-shed without its own licensing and inspection is immaterial to the issue of reasonableness of Madison's decision to require inspection by its own personnel. If the citizens of Janesville believe that Chicago inspection is sufficient—or if they should believe they are safe in drinking unpasteurized milk without any ordinance or inspection—that is their prerogative.

While appellant's brief (p. 45) claims agreement among various witnesses to the adequacy of section 11 of the suggested ordinance, examination of their testimony does not bear out that statement. Dr. Kincaid stated it is a matter of opinion (R. 66); Edward Friday, Senior Milk Sanitarian of Madison, pointed out there are degrees of safety, and that "in order to promote the greatest amount of public health in our milk supply, I believe that our department should make inspections of all farms and all plants." He also pointed out that if a city is unable to make inspections, it would have to resort to the rating procedure of the United States Public Health Service. (R. 127-128) Clarence Luchterhand, Milk Sanitarian for the Wisconsin State Board of Health, stated "it would be difficult to answer whether a health commissioner of a particular city could reasonably conclude that the spot check system advocated by the United States Public Health Service would not be as efficient as that made by some other method; that would be a prerogative of the local health officer." (R. 149) When asked specifically whether the Madison five mile pasteurization limitation is a necessary health measure, he stated he believed it is a prerogative of the local community. (R. 153)

Attention should also be called to testimony not pointed out by appellant. Dr. Starr Nichols, Professor of Sanitary Chemistry at the University of Wisconsin and Assistant Director of the Wisconsin State Laboratory of Hygiene, stated it is necessary to exercise constant and close supervision over cattle, farms and milk plants; that an ordinance is not sufficient since it must be enforced; and that it is not unreasonable for Madison to require inspection of plants and farms. (R. 159) He further stated he thought pasteurization plants should be within a reasonable distance of Madison, and that farms likewise should be within a reasonable distance, because you have better control over production. (R. 160). Dr. Louis Fauerbach, Assistant Health Commissioner of Madison stated he would not trust any inspection outside of Madison's jurisdiction beyond which the City could have control and constant supervision, and there is no substitute for regular inspection by the city's own personnel. He flatly stated he would not be willing to rely on inspectors of the Chicago Board of Health to inspect the source of supply of Madison's milk. (R. 135)

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3. Fluid milk regulation and inspection problems are not comparable to those of meats and vegetables.

Throughout its brief appellant has considered fluid milk in the same category as meats and vegetables as far as the necessity of local inspection and of local licensing is concerned. These arguments clearly disregard many vital differences between milk and meats and disregard the health problems involved.

Fluid milk production, processing and distribution is largely a local matter while meat is nation wide. As the record in this case shows, raw milk tends to flow from the

farm to nearby plants. (R. 122) The Madison distributors are all supplied by about five hundred farms, all located within twenty miles of the City. The appellant's large plants at Chemung and Huntley, Illinois, each supplied by more than one thousand farms, draw only from a radius of from twenty-five to thirty miles. We submit the Court can take judicial notice of the fact that most of the cities of the country have located in or near them the milk pasteurizing and bottling plants which serve the consumers in their immediate areas. However, with respect to meats it is common knowledge that the meat industry of the country is largely served by the processing plants in the great packing centers such as Chicago and Kansas City. Unlike the normal milk bottling plant, these meat packing centers draw their raw materials from great distances and distribute their finished products throughout the nation. The entire economic organization of the fluid milk pasteurizing and distributing business is essentially local, while that of meat processing and distribution is essentially nation wide in scope.

Furthermore, the health regulations which have of necessity been developed for fluid milk are entirely different in character from those for meats and they require local supervision to an extent unknown in meats. Milk regulations, as typified by the Madison milk ordinances and the milk ordinance recommended by the United States Public Health Service, not only require inspection of the raw material as it is delivered to the processing plant and of the finished product as it goes through and leaves the plant; they contain minute requirements regulating conditions on the farms on which the milk is produced. The milk ordinance recommended by the United States Public Health Service contains thirty-five paragraphs of detailed farm regulations alone, covering construction of farm buildings, sanitation, and the entire field of keeping and care of dairy cows

and drawing and handling of milk and all phases of farm activity which can possibly affect the quality of milk produced (R. 168-180); the "Milk Code" to be used as legal interpretation of those farm provisions contains some forty-four pages of fine print (see Public Health Bulletin, No. 220, 1939 Ed., pages 37-81). The Madison milk ordinance contains some thirty-four paragraphs of such detailed farm regulations. No doubt any such farm regulations dealing with the production of meat animals would be unreasonable. However, in the case of fluid milk they are recognized as reasonable and necessary for the protection of the public health.

Furthermore, while each meat carcass can be inspected in the packing plant so that in effect all meat shipped from a plant is inspected in the plant, the inspection of each quart of milk is not possible. Testing and inspection of milk is done by a process of periodic sampling. The maintenance of uniformly good farm conditions is relied upon for the maintenance of good milk delivered from a farm between samplings. Also many of the farm standards set by the ordinances require considerable discretion and judgment on the part of inspectors. Thus, certain of the ordinance requirements are that barns, milk houses, etc., shall be "kept clean." As was testified by Dr. Fauerbach, Assistant Health Commissioner of Madison, he would not trust any inspection outside of the City's jurisdiction beyond which it could have control and constant supervision, because personality enters into inspection work and there is no substitute for regular inspection of farms by the City's own personnel. (R. page 135)

Thus, inspection of fluid milk and of the farms which produce it is necessarily a local matter and it is submitted that it is not unreasonable for a community to insist on inspection by its own personnel rather than to rely on the personnel of other municipalities.

4. *General Order 125 of the Wisconsin Department of Agriculture does not affect this case.*

Several arguments and statements of appellant scattered throughout its brief require brief mention and correction.

At various points in its brief, appellant has referred to General Order 125 issued by the Wisconsin Department of Agriculture. This order is not in the record of this case, but since appellant has referred to it, we have set out the pertinent portions, omitting the technical specifications, in an appendix to this brief. First, be it noted, appellant concedes the Wisconsin Department of Agriculture has no authority to prescribe standards for Wisconsin cities (Brief, p. 57); consequently appellant agrees this is in no sense State law or regulation limiting Madison to the standards of the order. This is a voluntary program, open only to persons who voluntarily subscribe to and participate in the program (Sections 3.01 and 3.02) in an effort to make Wisconsin milk more acceptable to fluid milk users elsewhere in the nation who are willing to rely on United State Public Health standards and methods. It recognizes the right of foreign markets to set higher standards. (Section 11.01) In no way does it attempt to deny the right of foreign markets to send their inspectors into Wisconsin to inspect milk and farms here, a procedure Chicago uses. The regulation has no bearing on the issues in this case. Appellant's statement that this regulation some way permits Wisconsin milk to "flow freely in interstate commerce" (Brief, p. 43) is, of course, meaningless; milk licensed under this program flows no more freely in interstate commerce than did milk before the regulation or milk not under the program.

Appellant's claim at page 44 of its brief, that Madison is, in fact, delegating to others than its own inspection

force, the inspection of certified milk and that Madison has exempted certified milk from the five mile pasteurization limit is completely unsupported by the record. Section 7.15 of the Madison ordinances, cited by appellant, on its face has no such connotation; it requires supervision by the State Board of Health or by the city. The record does not even disclose that the State Board of Health has any such service available. Further, all milk, including certified milk, must be pasteurized (Section 7.17, R. 264), and hence is subject to the five mile pasteurization limit.

No more meritorious is appellant's argument that Madison "has for years, and still is, forced to drink ungraded milk" (Brief, p. 46), which is merely an attempt to infer that Madison's milk has been poor. The record contains no comparison of the quality of appellant's milk and of that sold in Madison. Until amendment of Madison's ordinances on August 27, 1949—about six weeks before trial of this case—the Madison ordinances had neither required nor permitted a "Grade A" label on pasteurized milk. (R. 208-236) As of the date of trial no distributor of milk in Madison was using a "Grade A" label, because there had not been time since the new ordinance for plants to qualify for use of Madison "Grade A" label, which required them to meet standards higher than those of the United States Public Health minimum suggestions. If a frank departure from the record will be forgiven, we can advise appellant that within a very short time after the trial, all milk sold in Madison was "Grade A" by Madison's higher standards, and was so labelled. However, a "Grade A" label is obviously meaningless unless one knows the ordinances and the inspection under which it is permitted. In the absence of State law or municipal ordinance to the contrary, "Grade A" signifies nothing. At page 57 of its brief, appellant refers to stamping of milk produced under the United

States Public Health minimum suggested standards as "*U. S.* Grade A." There is no such label provided for in the United States Public Health suggested ordinance or elsewhere.

Appellant's argument (Brief, p. 72), that Section 7.25 of the present Madison ordinances, which refers over to the United States Public Health Service Milk Code, in any way affects this case is equally spurious. That section obviously can refer only to those sections of the code which deal with provisions of the Madison ordinance modeled after the United States Public Health Service suggested ordinance; on its very face Section 7.25 states the Code shall not apply to upward revisions.

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5. *The State Court cases cited by appellant are not relevan to the Madison ordinance.*

Analysis of the State Court cases relied on by appellant shows that in all those cases there were present elements not present in this case, which led to the decisions cited. *Higgins vs. City of Galesburg*, 401 Ill. 87, 81 N. E. (2d) 520, expressly refrained from passing on any constitutional questions. The entire basis of the decision was that under the Illinois Cities and Villages Act, which grants such powers as Illinois municipalities have, a municipality is forbidden police jurisdiction beyond one-half mile from its corporate limits; hence it has no authority under state law to require licensing of either producers or processors located farther away or to require that milk be pasteurized within ten miles of the city. *Dean Milk Company vs. City of Waukegan*, 403 Ill. 597, 87 N. E. (2d) 751, was decided on the same ground, with the court further pointing out that the Waukegan ordinance completely prohibited the

sale of milk from beyond the county in which Waukegan is situated and that the city was in fact accepting outside milk upon the inspection made by another municipality. None of these elements is present in the case at bar.

La Franchi vs. City of Santa Rosa, 8 Cal. (2d) 331, 65 P. (2d) 1301, was decided under California state law which fixed fluid milk standards and allowed municipalities individually and in groups to establish inspection services and which provided milk graded and inspected by one district shall be accepted throughout the district. The milk inspector from Santa Rosa actually inspected the plaintiff's raw milk; and the same man, in his capacity of milk inspector for an adjoining city, actually inspected the nearby pasteurization plant from which plaintiff wished to sell milk in Santa Rosa. The milk was conceded to meet all standards of state law and of the Santa Rosa ordinances, except it was pasteurized five miles outside the city. Plaintiff's plant was located within the Santa Rosa inspection district approved by state authorities. Under these circumstances, none of which is present here, the court held Santa Rosa's ordinance requiring pasteurization within the city limits to be invalid, and that its purpose was to erect a tariff barrier. The court distinguished *Witt vs. Klimm*, 97 Cal. App. 131, 274 P. 1039, by pointing out that there the milk was not from the same inspection district and hence the state law did not require its acceptance by San Francisco.

Another feature of the California state law was the basis for decision of *Meridian Ltd. vs. Sippy*, 54 Col. App. (2d) 214, 128 P. (2d) 884, which condemned an ordinance of the City of Stockton requiring licensing of all producers and distributors of milk and forbidding licensing of such persons located beyond the limits of jurisdiction of its health officer (San Joachim County). The court based

its decision on the California Agricultural Code which provided that the State Department of Agriculture could name the health officer of one community to license and inspect for all communities in which the milk was to be sold and to enforce all milk ordinances of all such communities. The State Department had named the Oakland health officer to inspect and license the milk involved here; hence the court held the admittedly higher standards of Stockton would be protected under the state system. The court did recognize that, lacking such system, a city might be justified in establishing its own inspection area:

> "If there were no general law on the subject giving to the people of the City of Stockton the protection of its high standards required by its ordinance, it might be reasonable to hold that Stockton or any other municipality, for the protection of the health of its inhabitants, could establish a reasonable inspection area; but the general law gives the state no right to issue a permit to sell or distribute milk in the City of Stockton, unless the permittee meets the standards of its ordinance. Therefore, it is unreasonable to require double inspection of the distributors, one by the city and another by the state, and also to require that the milk so distributed be produced in San Joachim County."
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> *Meridian, Ltd. vs. Sippy,*
> 128 P. (2d) 884, 888.

Prescott vs. City of Borger, 158 S. W. (2d) 578 (Court of Civil Appeals, Texas), decided no question of constitutionality under the United States Constitution. It was decided wholly under Texas law—that since the State Legislature had entered the field of fluid milk regulation by statewide statutory regulation, a Texas municipality did not

have power to require that its milk be produced in a given county. *City of Abilene vs. Tennessee Dairies*, 225 S. W. (2d) 429 (Court of Civil Appeals, Texas), merely held that in view of the fact that plaintiff's milk was inspected by State inspectors, it was unreasonable of the City of Abilene to require its own inspection and to charge some distributors a heavy inspection fee amounting to about four times the fee charged local distributors.

In *Grant vs. Leavell*, 259 Ky. 267, 82 S. W. (2d) 283, the City of Louisville tried to regulate the sale of raw unpasteurized milk by an ordinance providing that no raw milk plants constructed beyond the corporate limits of the city after the enactment of the ordinance, should be permitted to sell milk in the city except as permitted by the health officer. The health officer then took the position that dealers already operating were furnishing enough milk to supply the city's demands for raw milk and refused to license the plant of plaintiff which was built after the ordinance was enacted and outside the city. The court pointed out the discrimination in allowing those already in the business to continue while denying the right of new companies to enter the business and struck out of the ordinance the provision denying the right to do business to plants built after the ordinance and outside the city.

In *Urban vs. Taylor*, 117 N. J. M. 887, 188 Atl. 232, again there was inspection by state inspectors under state law, and the town merely took the position it had enough milk dealers. The court specifically said "Mere lack of funds to investigate a source of supply is not sufficient reason to justify the refusal of a permit, in view of *the circumstances that there seems to have been adequate inspection by state inspectors.*" (emphasis added)

City of Greenville vs. Cabell's, Inc., 207 S. W. (2d) 898 (Court of Civil Appeals, Texas), has no bearing on this

case. There was no pasteurization limit involved; under the city's ordinances all milk was admissible if it met the city's standards, and the court found Cabell's milk met those standards and also met state standards and was state inspected. Properly, in this situation, the court held refusal of the city health officer to admit Cabell's milk was arbitrary.

In *City of Wewoka vs. Rose Lawn Dairy*, 212 P. (2d) 1056 (Sup. Ct., Okla.), there were two important elements not present in the case at bar. Oklahoma had complete milk regulatory statutes with state inspection and the court found the Dairy's milk met state standards and was state inspected. The city ordinance, furthermore, contained the "reciprocal inspection" provisions of section 11 of the United States Public Health suggested ordinance. The court held, under that ordinance provision, lack of funds to inspect distant milk plants and their supplying farms located on a milk shed with a grade of 90% or more is no basis for refusing milk from that plant; in effect the court held if the section 11 "reciprocal inspection" provision is adopted a city has given up its right to license and inspect distant plants and farms. This decision strikingly illustrates the reason why Madison refused to adopt section 11; adoption would require Madison either to forego inspection of distant plants and farms and rely on foreign inspection over which it has no control, or to suffer unbearable inspection costs to accommodate any distant dairy company that might wish to attempt selling milk in Madison.

Again, in *Moultrie Milk Shed vs. City of Cairo*, 206 Ga. 348, 57 S. E. (2d) 199, the decision shows there was complete state regulation and inspection of all milk including the milk of the dairy involved. Further it is clear from the decision that the complaining dairy's milk had been accepted in the City of Cairo until passage of the ordinance

requiring pasteurization in the county in which Cairo is located. Under these circumstances, which are quite different from those in Madison, the Court held the ordinance was, in purpose, a trade barrier. The court, it may be noted, specifically differentiated and cast no doubt upon an earlier decision. *Wright vs. Richmond County Dept. of Health*, 182 Ga. 651, 186 S. E. 815, which upheld a local ordinance prohibiting the sale of ice cream manufactured beyond a radius of sixty miles.

In *State ex rel Larson vs. City of Minneapolis*, 190 Minn. 138, 251 N. W. 121, the Minneapolis milk ordinances did not contain detailed farm regulations or provide for farm licensing and inspection as is provided in the Madison and all other modern milk ordinances.

Therefore, it is submitted that appellant's statement (Brief, p. 75), that no state court decisions have held ordinances similar to Madison's to be valid, is, indeed, incorrect. None of the cases discussed by appellant contained situations of fact and of state law similar to those in Madison's case. Madison's case, it is submitted, is that involved in *Lang's Creamery, Inc. vs. City of Niagara Falls*, 224 App. Div. 483, 231 N. Y. S. 368, and *Witt vs. Klimm*, 97 Cal. App. 131, 274 P. 1039, cases apparently overlooked by appellant, in both of which cases ordinances similar to Madison's were upheld on attacks based on the Fourteenth Amendment. Also in *McKenna vs. City of Galveston*, 113 S. W. (2d) 606 (Ct. of Civ. App., Texas), a local ordinance prohibiting sale in the city of ice cream not pasteurized and frozen on the same premises in the city was held a reasonable exercise of the city's police power.

The Wisconsin Supreme Court has on two occasions affirmed the validity of pasteurization limits for individual Wisconsin cities. *Dyer vs. City of Beloit*, 250 Wis. 61, 27 N. W. (2d) 733. *Dean Milk Company vs. City of Madi-*

son, 257 Wis. 308, 43 N. W. (2d) 480. The court has specifically found the ordinances reasonable in the light of the local conditions involved, upon application of the test of validity expressed in the *Dyer* case and reaffirmed in *Dean Milk Company vs. City of Madison*, 257 Wis. 308 at 313, which test we submit is proper and was properly applied in this case:

> "That cities have a right to pass a milk ordinance for the welfare and health of their citizens is not disputed, and milk ordinances are general in the state of Wisconsin and elsewhere in the nation. Such an ordinance must be reasonable and not arbitrary, must not go beyond the reasonable demands of the occasion, and must tend to accomplish the purpose of its adoption. Courts will not interfere with the exercise of police power by a municipal corporation in the absence of a clear abuse of discretion and unless it is manifestly unreasonable and oppressive, for it is not within the province of the courts, except in clear cases, to interfere with the exercise of this power reposed by law in municipal corporations * * *"

It is submitted that the ordinance involved is reasonable and non-discriminatory, as was specifically found by both the trial court and the Wisconsin Supreme Court in this case; and that as stated by the trial court: "The City of Madison—in the public concern over health—has an autonomy, a measure of local self government, which, if exercised reasonably, need give way only to a constitutional enactment by the legislature of Wisconsin or the Congress of the United States, if such exists. None such does exist as yet." Therefore, it is submitted that Madison's five-mile pasteurization ordinance is valid under the Fourteenth Amendment to the United States Constitution.

II.

The Five-Mile Pasteurization Limit Contained in Section 7.21 of the Madison Ordinances Is Not Invalid Under the Interstate Commerce Clause of the Constitution of the United States.

It is submitted that by all criteria of the validity of local health regulations which have been enunciated by this Court in dealing with commerce-clause attacks, the Madison five-mile pasteurization limit is a valid exercise of local police power for the protection of public health.

In dealing with the commerce-clause attack on the Madison ordinance, as was necessary on the due-process attack, analysis of appellant's contentions is necessary. Consideration of the consequences of such contentions if adopted will, it is submitted, demonstrate that appellant's contentions are wholly untenable.

Appellant's commerce-clause attacks on the ordinance all fall under the following arguments: (a) That the Madison five-mile pasteurization limit was adopted as an economic barrier and not as a measure for protection of public health; (b) That the ordinance discriminates against milk from outside the state; (c) That neither a state nor a municipality thereof can, under the commerce-clause, fix or maintain any milk standards for milk to be sold therein which are higher or more rigid than the minimum standards suggested by the United State Public Health Service or insist on its own inspection of milk from an out-of-state milk-shed which has been rated 90% or more under the suggested United States Public Health system; hence, that a state or locality thereof must accept milk from such an out-of-state milk-shed regardless of the receiving locality's higher standards and without inspection of the plants and

farms by its own personnel. We shall treat each of these attacks separately.

A — *The five-mile pasteurization limit is a reasonable exercise of the police power for the protection of the public health. It is not a barrier imposed for protection of local economic interests.*

To support its contention that the Madison five-mile pasteurization limit, as an alleged trade barrier, violates the commerce clause, appellant has relied upon *Baldwin vs. G. A. F. Seelig, Inc.*, 294 U. S. 511, 55 S. Ct. 497, and *H. P. Hood and Sons, Inc., vs. DuMond*, 336 U. S. 525, 69 S. Ct. 657. There, however, the Court was dealing with measures which were concededly designed for the protection of New York's residents from the *economic competition* of residents of other states. Referring to the measures involved in both cases, the court pointed out, in *H. P. Hood and Sons, Inc., vs. DuMond*, 336 U. S. 525 at 531:

> "In neither case is the measure supported by health or safety considerations but *solely* by protection of local economic interests, such as supply for local consumption and limitation of competition." (emphasis supplied)

In *Baldwin vs. G. A. F. Seelig, Inc.*, 294 U. S. 511, this Court condemned a New York statute which was attempting to protect New York milk producers from the competition of Vermont producers who were willing to sell their milk for less money. In *H. P. Hood & Sons, Inc., vs. DuMond*, 336 U. S. 525, the Court condemned New York's attempt to protect its milk consumers from the competition of Boston consumers. The Court recognized that neither

decision in any way denied to a state power to protect the health of its citizens: in *H. P. Hood & Sons, Inc., vs. Du-Mond*, 336 U. S. 525, at 531, the Court stated:

> "It (Mr. Justice Cardozo's opinion in Baldwin vs. G. A. F. Seelig, Inc.), recognized, as do we, broad power in the state to protect its inhabitants against perils to health or safety, fraudulent traders and highway hazards even by use of measures which bear adversely upon interstate commerce."

The Madison five mile pasteurization was not designed as a trade barrier or to suppress the competition of any person located within or without the state. It is a part of the City's detailed milk regulations which set standards for, and control over, the entire matter of production, processing and distribution of milk. It was enacted as part of that complete system of regulation to promote the convenience and efficiency of inspection and of controlling standards. (R. 129) Nothing in the ordinance or in any other Madison ordinance would prevent the appellant or any other distributor from engaging in pasteurization within the permitted distance and from competing with the present distributors—the record is entirely barren of any intent or desire on the part of the city to protect the present Madison distributors from competition. Nor does the record show any intent or desire to protect near-by producers in any way; how this ordinance could protect from competition the near-by producers, who have a variety of possible outlets for their milk, including shipment to the Chicago fluid milk market, is not explained by appellant.

The trial court specifically found: "Madison's five mile pasteurization ordinance is a valid regulation under the 'police power' to protect the public health and welfare.

It simplifies inspection of plants by requiring them to be near at hand, thus permitting more intense and constant inspecting than if such establishments were located anywhere in the United States" (R. 6, 53), and "That Section 7.21 of the general ordinances of the City of Madison constitutes a reasonable and proper health regulation for the protection of the lives and health of the residents of the City of Madison." (R. 54) The Supreme Court of Wisconsin concurred therein (R. 295):

> "We agree with the trial court. The five mile limitation as to pasteurization plants is reasonable as applied to this plaintiff. It has no pasteurization plant within any reasonable distance of Madison. This provision of this ordinance was not adopted to exclude plaintiff, nor does it discriminate against it."

Nothing in the record bears out appellant's claim that this ordinance is an economic barrier to prevent the competition in Madison of appellant or of any other distributor.

As pointed out by the trial court (R. 16), the five mile limit contains no limit on production of milk. If appellant were willing to comply with the city's pasteurization requirement, and if the milk of its Illinois producers and the conditions under which it was produced met Madison's standards and were licensed and inspected by Madison, nothing in the pasteurization limit of Section 7.21 of the Madison ordinances would prevent appellant from selling Illinois produced milk in Madison. True it is, the location of pasteurization plants within five miles of the city not only increases efficiency of inspection and supervision of those plants; also because milk tends to flow from the farm to nearby processing plants where the nearby supply is adequate (R. 122), the ordinance tends to a utilization of

the tremendous volume of milk produced on farms located within a reasonable inspection and supervision distance of Madison. (cf. *H. P. Hood & Sons, Inc., vs. DuMond*, 336 U. S. 525, 540)

With more than ten times Madison's total milk requirements being produced within 25 miles of the city, within an efficient and convenient inspection distance, it is entirely reasonable, it is submitted, for the city to adopt a measure which tends to utilize that supply which is located near enough for convenient and efficient inspection. Despite the fact the pasteurization limit does not prohibit the use of milk from beyond that distance, the record shows that all milk sold in the city since at least 1926 has been produced on farms within twenty miles of the city. (R. 118) The efficiency and economy of inspection and supervision of farms where the milk is produced, is therefore promoted.

In various fundamental respects the Madison situation differs from that presented to District Court in *Miller vs. Williams*, 12 F. Supp. 236 (D. C., Md.). There, the Health Commissioner of the City of Baltimore took it upon himself, without benefit of policy directed by the city government by ordinance, to prohibit absolutely the continued sale of cream which prior to that time had been admitted to the city, and which was produced more than fifty miles from the city. There was an absolute prohibition, which is lacking in this case; the cream involved had previously been admitted to the city, which is not the case here; there was no policy expressed by the city council as there is in this case. Furthermore, Judge Chestnut's attention apparently was not directed to the basic difference between fluid milk on the one hand and meats, vegetables and fruits on the other — he was worried that regulations approved for fluid milk might be held valid for these other foods, none of which require the detailed regulation and inspection of

the premises where produced, as fluid milk admittedly requires

Similarly, the factors present in *Sheffield Farms Co., Inc. vs. Seaman*, 114 N. J. Law 455, 177 Atl. 372, and *Urban vs. Taylor*, 117 N. J. M. 887, 188 Atl. 232, which determined those cases are not present here. There, there was a system of state inspection of milk and the court held, in effect, the city was bound as a matter of state law to accept the state inspection. There is no state inspection, nor are there state standards for municipalities in Wisconsin. Furthermore, here the local health department merely took the position there were already enough milk dealers in the city; none of Madison's ordinances in any way attempts to limit the number of dealers or to foreclose new dealers from entering business in Madison. In the cited cases, the Court's decisions were based on those factors which are not present here.

Unless the rights of a locality to set its own reasonable milk standards and to inspect all of its milk supplies and the farms where that milk is produced are to be denied, if they in any way affect interstate commerce, it submitted that a city situated as Madison is, in the heart of a nearby more than adequate milk supply, is not required to accept pasteurized milk from dealers in any part of the country merely because that milk is produced and processed on milk sheds which have been rated 90% or more. That is the tenor of appellant's contention. To accept the appellant's contention would deny the locality's right to set its own reasonable standards and to make its own inspections. To hold that a city situated as is Madison with respect to its milk supply may set its own standards and make its own inspections but that it may not take steps which tend to utilize its local supply would, as a practical matter, require abdication by the city of those rights. It would take at least three additional inspectors to inspect

the one plant and its supplying farms from which appellant proposes to deliver milk to Madison (R. 122), no matter how little milk appellant sold in Madison. For each other plant of appellant, or for each other dealer from Chicago or elsewhere in the country, that burden of inspection would be correspondingly increased. The burden of inspection of the 950 or more farms supplying appellant's Chemung plant is not the measure of the city's burden. If milk pasteurized in appellant's Chemung plant must be accepted by Madison, then so must milk pasteurized in any plant located any place in the country. Such burden would obviously be intolerable for a small city of Madison's size and the city would, of practical necessity, be forced to abandon its own standards and inspection.

B — *The Madison five-mile pasteurization limit does not discriminate against interstate commerce.*

Appellees herein recognize that local measures which discriminate against foreign business in favor of local business exceed local authority under the commerce-clause.

Baldwin vs. G. A. F. Seelig, Inc.,
294 U. S. 511, 55 S. Ct. 497.

However, in this case, despite appellant's protestations that it is being persecuted, no discrimination against it, or against any interstate commerce, has been, or can be shown. All of Madison's milk regulation ordinances, including the pasteurization requirement under attack, apply equally to milk produced any place—whether within or without the state, in the immediate vicinity of the city or at a great distance from it. All the regulatory ordinances apply equally to milk produced on the Madison, Milwaukee,

Green Bay or any other Wisconsin milk-shed as well as to that produced on the Chicago or any other foreign milk-shed.

The absence of discrimination against interstate commerce in favor of local commerce (as well as the difference between meats and fluid milk as to character of inspection required) distinguishes the Madison situation from the situations in *State of Minnesota vs. Barber*, 136 U. S. 313, 10 S. Ct. 862, and *Brimmer vs. Rebman*, 138 U. S. 78, 11 S. Ct. 213, which are relied upon by appellant. (Brief, pp. 50, 51) In each of those cases the Court found there was a discrimination directed against interstate commerce, which is not present here. In *State of Minnesota vs. Barber*, 136 U. S. 313, at 323, the court pointed out:

> "If this legislation does not make such discrimination against the products and business of other states in favor of the products and business of Minnesota, as interferes and burdens commerce among the several states, it would be difficult to enact legislation that would have that result."

In *Brimmer vs. Rebman*, 138 U. S. 78, 11 S. Ct. 213, the Court's decision was grounded on the fact that the state statute imposed no inspection or fee upon meats slaughtered within 100 miles of the place of sale but imposed inspection and a prohibitive fee on more distant meats. The presence of discrimination in those cases and the complete absence of it in this case, as well as the fundamentally different problems of meat and milk regulation discussed elsewhere in this brief, wholly set those cases apart from this. Under the Madison ordinance there is no discrimination of any kind; the ordinance under attack requires all milk, no matter where produced, to be pasteurized in plants licensed

by Madison and situated within five miles of the city's center.

C — *The Madison pasteurization limit does not contravene the Interstate Commerce Clause, because it lies within a field wherein Congress has not acted to establish regulations and which has been recognized as a proper field for local regulation.*

Appellant's basic contention, that a state or locality thereof cannot in any way interfere with or burden the interstate shipment of "wholesome" milk is, it is submitted, clearly based on a misconception of the place of the Interstate Commerce Clause in our constitutional system. Appellant's statement, "The Commerce Clause, *per se*, prohibits Madison from interfering with interstate commerce" (Brief. p. 48), is the basis of its whole argument and is patently not in accordance with long-standing doctrines established by this Court.

True it is that the Commerce Clause is a "grant of power to Congress to control commerce," *Carter vs. Commonwealth of Virginia*, 321 U. S. 131, 64 S. Ct. 464; and that it is a "limitation upon the power of the States," *Freeman vs. Hewitt*, 329 U. S. 249, 67 S. Ct. 274. But appellant fails to appreciate that this Court has always recognized certain areas in which the states and localities thereof have power of regulation even if that local regulation burdens or limits interstate commerce.

Freeman vs. Hewitt,
329 U. S. 249, 253;
H. P. Hood & Sons, Inc., vs. DuMond,
336 U. S. 525, 530.

In many cases this Court has allowed local regulations which "bear adversely upon interstate commerce" (*H. P. Hood & Sons, Inc., vs. DuMond*, 336 U. S. 525, 530), where either: (a) national uniformity of regulation is not essential and Congress has not acted on the subject, or (b) there is "only a partial exercise of that power of regulation by the federal government," or local regulation is allowed by Congress, *Cloverleaf Butter Co. vs. Patterson*, 315 U. S. 148, 155, 62 S. Ct. 491, 495, and cases therein cited. It is submitted that the field of local fluid milk standards and regulations is one wherein Congress has not acted, except to recognize and permit local standards and regulations; and that the field is, furthermore, one wherein national uniformity of regulation is neither essential nor practicable. Hence, it is submitted that appellant's contention that local standards for and regulation of fluid milk are not permitted under the Commerce Clause, even though they be reasonable and not discriminatory, cannot be sustained.

Citation of only a few cases decided by this Court demonstrates the recognition of the validity of local regulation in the fields above mentioned and the general principles enunciated by the Court. The areas within which local regulation are permitted have been discussed in *Parker vs. Brown*, 317 U. S. 341, 63 S. Ct. 307, wherein state regulation of the California raisin industry, which curtailed interstate shipment of raisins, was upheld by unanimous decision of the Court:

> "This Court has repeatedly held that the grant of power to Congress by the Commerce Clause did not wholly withdraw from the states the authority to regulate the commerce with respect to matters of local concern, on which Congress has not spoken." (citing cases)
>
> 317 U. S. 341, 360.

"When Congress has not exerted its power under the Commerce Clause, and state regulation of matters of local concern is so related to interstate commerce that it also operates as a regulation of that commerce, the reconciliation of the power thus granted with that reserved to the state is to be attained by the accommodation of the competing demands of the state and national interests involved. (citing cases)

"Such regulations by the court are to be sustained, not because they are 'indirect' rather than 'direct,' see Di Santo vs. Pennsylvania, supra; cf. Wickard vs. Filburn, supra, not because they control interstate activities, in such a manner as only to affect the commerce rather than to command its operations. But they are to be upheld because upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities, and which, because of its local character and the practical difficulties involved, may never be adequately dealt with by Congress. Because of its local character also there may be wide scope for local regulation without substantially impairing the national interest in the regulation of commerce by a single authority and without materially obstructing the free flow of commerce, which were the principal objects sought to be secured by the Commerce Clause." (citing cases)

317 U. S. 341 at 362, 363

"In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their

authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."

317 U. S. 341, 351.

In *Duckworth vs State of Arkansas*, 314 U. S. 390, 394, 62 S. Ct., 311, the Court stated:

"While the commerce clause has been interpreted as reserving to Congress the power to regulate interstate commerce in matters of national importance, that has never been deemed to exclude the states from regulating matters primarily of local concern with respect to which Congress has not exercised its power, even thought the regulation has some effect on interstate commerce."

314 U. S. 390, 394.

"Where the power to regulate commerce for local protection exists, the states may adopt effective measures to accomplish the permitted end."

314 U. S. 390, 396.

These cases set out the recognized doctrines of the power of local governments to regulate commerce in the absence of any Congressional action. There is no doubt that the power of Congress to regulate commerce is plenary, but in the absence of Congressional regulation, the localities are not devoid of power of regulation unless the area is one where of necessity federal regulation is required. And even where Congress has acted, local regulation is not precluded unless Congressional intention is shown to supersede or exclude state action.

Cases involving the reconciliation of local regulation with federal regulation where Congress has acted are undoubtedly extremely vexacious and there is no need here

to attempt a detailed discussion of all the problems this Court has faced in this field. The question was thoroughly discussed in *Cloverleaf Butter Co. vs. Patterson*, 315 U. S. 148, 62 S. Ct. 491, where the Court pointed out, 315 U. S. at 155:

> "It has long been recognized that in those fields of commerce where national uniformity is not essential, either the state or federal government may act. Willson vs. Black-bird Creek Marsh Co., 2 Pet. 245, 7 L. Ed. 412; California vs. Thompson, 313 U. S. 109, 114, 61 S. Ct. 930, 932, 85 L. Ed. 1219. Where this power to legislate exists, it often happens that there is only a partial exercise of that power by the federal government. In such cases the state may legislate freely upon those phases of the commerce which are left unregulated by the nation. But where the United States exercises its power of legislation so as to conflict with a regulation of the state, either specifically or by implication, the state legislation becomes inoperative and the federal legislation exclusive in its application.
>
> "When the prohibition of state action is not specific but inferable from the scope and purpose of the federal legislation, it must be clear that the federal provisions are inconsistent with those of the state to justify the thwarting of state regulation."

In *Currin vs. Wallace*, 306 U. S. 1, 59 S. Ct. 389, which involved the superseding of local regulation of tobacco auctions by the Federal Tobacco Inspection Act of August 23, 1935, the Court said, 306 U. S. at 12:

> "Inspection and the establishment of standards for commodities has been regarded from colonial days as appropriate to the regulation of trade, and

> the authority of the States to enact inspection laws is recognized by the Constitution, Art. I, Sec. 10, Cl. 2. (cases cited) But the inspection laws of a State relating to exports as to articles purchased for shipment to other States are subject to the paramount regulatory power of Congress."

This Court has, for example, upheld state regulation requiring that feed moving into a state bear labels stating its components in addition to labels required by federal regulation. *Savage vs. Jones*, 225 U. S. 501, 32 S. Ct. 75; and it has upheld a state regulation that cattle being shipped into a state be accompanied by a certificate that they were from herds free of Bang's Disease as well as the certificate, required by the federal Cattle Contagious Disease Acts, that the animals themselves were free of the disease. *Mintz vs. Baldwin*, 289 U. S. 346, 53 S. Ct., 611. In the latter case the Court stated, 289 U. S. at 350:

> "The purpose of Congress to supersede or exclude state action against the ravages of disease is not lightly to be inferred. The intention so to do must definitely and clearly appear."

In the case at bar no action has been taken by Congress to set any standards for, or to regulate the flow of, fluid milk, raw or pasteurized, in interstate commerce. As pointed out by the Wisconsin Supreme Court, that is a field which Congress has left to local regulation. *Dean Milk Co. vs. City of Madison*, 257 Wis. 308, at 315. Appellant's contention that the movement of "wholesome" milk in interstate commerce cannot be affected by local regulation clearly cannot be sustained.

No standards by which it can be determined whether milk is "wholesome" exist except through local regulations.

There is no federal regulation. Congress has never attempted to set up either the standards or procedures of the United States Public Health Service suggested ordinance or any other standard or procedures for the country in the matter of fluid milk. Even the United States Public Health Service recognized that the acceptance of its suggested ordinance is a matter solely for local determination. Congress has in fact recognized that fluid milk standards and procedures are a matter of local regulation, and in the statutes covering the introduction of milk into the District of Columbia, Congress has provided for the fixing of local standards for the District and for licensing and inspection by the District Health Officer of all milk introduced into the District for fluid purposes and of all plants where it is processed and farms where it is produced, wherever they may be located. (43 Stats., Ch. 358, District of Columbia Code, Title 33, Secs. 33-301 et seq.) Thus, not only has there been no Congressional action to set national standards and procedures, there has been actual recognition by Congress that the setting of standards and requirements of inspection are local matters.

Furthermore, the regulation of fluid milk by federal authority clearly would be entirely impracticable. Unlike meats, vegetables, fruits, etc., where inspectors are not interested in conditions under which the products are raised, it is universally conceded that maintenance of a safe, pure milk supply requires meticulously detailed regulation and constant inspection of all farms where the milk is produced. Federal regulation and inspection thus could not be accomplished by stationing personnel at a relatively few processing plants, as is possible in the case of meats; it would require, in addition, licensing and minute continual inspection of hundreds of thousands of farms scattered throughout the country by federal personnel.

In *Milk Control Board of Pennsylvania vs. Eisenberg Farm Products*, 306 U. S. 346, 352, 59 S. Ct. 528, this Court recognized that the purchasing of milk for out-of-state shipment is "essentially local" in character. Clearly, we feel, the consumption of milk and the regulation of milk for local consumption is even more local in character. If the appellant's position in this case were accepted by the Court, effective local regulation of milk for local consumption would be prohibited; and since there is no federal regulation on the subject, there would be left free of effective regulation all milk flowing in interstate commerce for local consumption. It is submitted that this result would seriously prejudice adequate protection of the public health in the field of fluid milk. The effect of an acceptance of the appellant's contention in this case would be to overturn the entire milk regulatory system which has developed throughout the country based on a local autonomy within reasonable limits for the protection of public health. No showing has been made by appellant that the recognition of this local autonomy has seriously affected interstate commerce dealings in fluid milk. It is submitted that clearly the over-riding interest of the protection of public health out-weighs the interest of those large milk distributing concerns which may be adversely affected by local reasonable health regulations with which they either cannot or will not comply.

Hence it is submitted that the appellant's claim that "wholesome" milk (without any standards being suggested by appellant to determine when milk is "wholesome") cannot be supported; and that, in the absence of federal regulation, the localities should be permitted to continue to establish and enforce their own reasonable standards, and to license and inspect all processing plants and farms which furnished milk to the localities. If the

localities are to continue to have these powers, they are entitled to adopt reasonable means to make their own control measures more efficient and economical. For a city such as Madison, situated in the heart of a milk producing area of tremendous volume, the means adopted by the city as part of its milk regulations in limiting pasteurization to an area within five miles of the city is an appropriate means to the ends in view. If a large milk dealer, such as appellant, proposes to ship milk from one milk-shed to many communities, it is only proper to require it to comply with the reasonable standards of each such community. It clearly would be neither reasonable nor in the interest of public health to require every community to lower its standards as to that dealer to the level of the dealer's own milk-shed to accommodate the dealer's desire to do an extensive business and thus give such dealer an unfair advantage over local dealers who are held to higher standards. Therefore, it is submitted that Madison's five mile pasteurization limit is a legitimate exercise of the local police power for the protection of public health and is not invalid under the Interstate Commerce Clause.

III.

The State Courts Properly Refused to Pass Upon the Validity of Section 7.11 of the Madison Ordinances.

Section 7.11 of the Madison general ordinances is the second section of the ordinances attacked by appellant. It is set out in the Record at pages 245 and 246. It makes unlawful the sale, etc., of milk in Madison from a source not possessing a Madison permit, provides that only persons who comply with the entire ordinance are entitled

to permits and for inspection of the farms by the Madison Health Commissioner prior to issuance of a permit and contains the provision to which appellant objects: "The Health Department shall not be obligated to inspect and issue permits to farms located beyond twenty-five (25) miles from the central portion of the City of Madison, otherwise known as the Capital Square." (R. 246)

As pointed out by the Wisconsin Supreme Court in its statement of the Case (R. 291-292) the trial court required appellant to separate its attacks on Section 7.21 and 7.11 of the ordinances into separate causes of action, so they could be considered separately. They were so separated in appellant's second amended complaint (R. 19-33), being the pleading on which the case was tried. In their answer to the second cause of action in that complaint, which dealt with section 7.11 of the ordinances, appellees denied there was any controversy between the parties as to section 7.11 as long as the five-mile pasteurization limit in section 7.21 remains in effect because appellant at no time has indicated it proposes to pasteurize its milk within the permitted five miles. (R. 50)

At no time in this action has appellant indicated any willingness to comply with the five mile pasteurization requirement. The trial court's decision, which upheld that limit consequently refused to pass upon the validity of section 7.11 (R. 17-18); the findings of fact found appellant did not intend to pasteurize within five miles so it had no rights, status or other legal relations affected by section 7.11 (R. 55); and the Declaratory Judgment ruled there was no justiciable controversy between the parties as to the construction or validity of section 7.11 and consequently dismissed appellant's second cause of action. (R. 58). The State Supreme Court affirmed that judgment. (R. 296)

In its Fourth and Fifth Assignments of Error appellant claims error in the fact that the state courts refused to

pass upon the validity of section 7.11 of the Madison ordinances. In its brief, as basis for this claim of error, the appellant has inaccurately stated the facts. The City of Madison did not deny appellant a permit to sell milk in Madison on the basis of section 7.11 of the ordinance. The denial of permit was in March of 1948 and section 7.11 of the ordinances was not adopted until August of 1949. The City of Madison has not refused to inspect the farms which supply the appellant's milk except on the basis that there was no point in making such inspection as long as the five-mile ordinance remains. The refusal of the City to furnish appellant with 950 applications for farm permits was based on that ground alone. (R. 69) The City has not refused a license to the appellant because its farms do not have permits but solely because appellant does not pasteurize within five miles of the City.

Consequently, as long as the five-mile pasteurization limit remains there is no justiciable controversy between the parties hereto, and the trial court and the Wisconsin Supreme Court so held.

Nothing in this case, if the five-mile pasteurization limit did not exist, would prevent appellant or any of the farmers supplying appellant, from seeking a determination in the Wisconsin courts of the validity of the twenty-five mile inspection provision if the City should refuse to inspect the farms. The cases cited by appellant in support of its claim that the refusal of the state courts to pass upon the twenty-five mile inspection provision denies it its rights all involve situations where there had actually been a determination of the issues by a court. Where there has been a determination by a court, unless an appeal is taken, or where the case has become moot during the course of an appeal, failure to secure reversal on an appeal leaves the original determination in effect. But this doctrine in no way applies where there has never been any determination

by a court, which is the situation in this case. This principle is shown in the decision of this Court in *United States of America vs. Munsingwear, Inc.*, decided by this Court November 13, 1950.

It is therefore submitted that so long as the five-mile limitation of section 7.21 of the ordinance stands and so long as the appellant has no intention of pasteurizing its milk within five miles of Madison, there is no justiciable controversy between the parties on the question of the twenty-five mile inspection provision in section 7.11 of the ordinances; and the state courts properly so held. That determination by those courts does not in any way prevent a proper party from contesting the validity of that ordinance in the future. Therefore, it is submitted there is no reason for this court to reverse the refusal of the state courts to pass upon the validity of section 7.11

CONCLUSION.

It is therefore respectfully submitted that the judgment of the Wisconsin Supreme Court which affirmed the validity of section 7.21 of the Madison Ordinances and which affirmed the judgment of the trial court refusing to pass upon the validity of section 7.11 because of the lack of justiciable controversy between the parties should be affirmed.

Respectfully submitted.

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APPENDIX

Excerpts From
Wisconsin Department of Agriculture,
General Order 125, entitled

"Standards and Regulations for the Production and Processing of Milk and Milk Products for Interstate Shipment."

* * * * *

It is ordered, that the following standards and regulations for the production and processing of milk and milk products for interstate shipment are hereby established and prescribed, effective November 15, 1949.

* * * * *

3.01. Any person who makes application on a form prescribed and furnished by the Department, who subscribes to this regulation, who pays the prescribed fees and who is approved by the Department may participate in this plan. Upon approval, a permit will be issued to the applicant by the Department.

3.02. Participation in this program is voluntary. Only a person who complies with the provisions of this regulation shall be entitled to receive and retain a permit authorizing participation.

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11. Out-of-State Markets.

11.01. No person holding a permit and participating in this program, or holding a permit and participating in a similar program pursuant to the provisions of a substan-

tially equivalent regulation under the supervision of a duly authorized health department as provided in section 17.03 hereof, shall sell or offer to sell any milk or milk products to any milk plant or milk distributor in any out-of-state market operating under the United States Public Health Service Code unless its compliance and the compliance of its producers with the provisions of this regulation and with the corresponding provisions of the United States Public Health Service Code as determined by United States Public Health Service rating meet the minimum standard maintained by such out-of-state markets.

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17. Scope of Regulation.

17.01. None of the provisions of this regulation shall be construed to apply to any person who has not voluntarily agreed to participate in the program for continuous inspection for interstate markets as herein provided unless he shall by label, statement, design or device or other representation in any manner attempt to induce a prospective customer to believe that the milk or milk products sold, offfered or exposed for sale, or in his possession or under his control have been produced and/or processed in conformity with the requirements of this regulation.

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18.02. Persons holding a permit and engaging in milk production and/or processing operations desiring to qualify under this regulation shall agree to pay to the state the cost of such inspection service at rates to be established from time to time by the Department; *Provided*, That the cost of the inspection service rendered to individual producers shall be paid by plants processing and/or distributing such milk and the milk products made therefrom.